



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

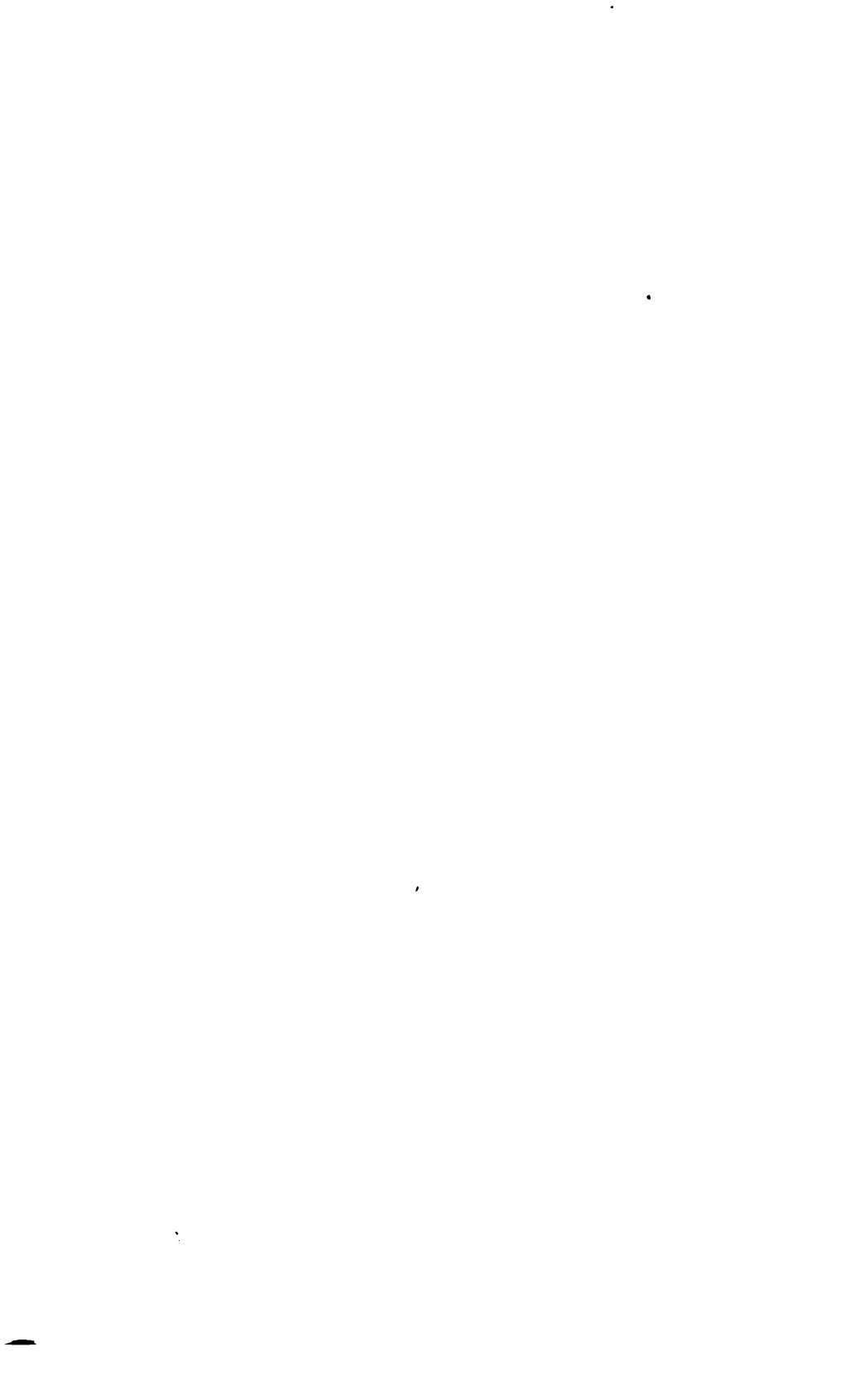
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





Jan 22 136
REPORTS

OF

Cases in Law and Equity *p*

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LIX.

ALBANY:

W. C. LITTLE & CO., LAW BOOKSELLERS.

1871.

Entered according to Act of Congress, in the year one thousand eight hundred and seventy-one,
By WEARE O. LITTLE,
In the Office of the Librarian of Congress, at Washington.

Rec. Jan. 24, 1872

STEREOTYPED AND PRINTED
BY J. M. DAVISON, SARATOGA SPRINGS.

JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1871.

FIRST JUDICIAL DISTRICT.

- CLASS 1. JOSIAH SUTHERLAND.
" 2. DANIEL P. INGRAHAM.
" 3. ALBERT CARDOZO.
" 4. GEORGE G. BARNARD.
" 5. JOHN R. BRADY.

SECOND JUDICIAL DISTRICT.

- " 1. JOSEPH F. BARNARD.
" 2. JASPER W. GILBERT.
" 3. ABRAHAM B. TAPPEN.
" 4. CALVIN E. PRATT.

THIRD JUDICIAL DISTRICT.

- " 1. CHARLES R. INGALLS.
" 2. HENRY HOGEBOOM.
" 3. WILLIAM L. LEARNED.
" 4. THEODORE MILLER.

FOURTH JUDICIAL DISTRICT.

- " 1. ENOCH H. ROSEKRANS.
" 2. PLATT POTTER.
" 3. AUGUSTUS BOCKES.
" 4. AMAZIAH B. JAMES.

FIFTH JUDICIAL DISTRICT.

- " 1. HENRY A. FOSTER.
" 2. JOSEPH MULLIN.
" 3. LE ROY MORGAN.
" 4. CHARLES H. DOOLITTLE.

JUSTICES OF THE SUPREME COURT.

SIXTH JUDICIAL DISTRICT.

- CLASS 1. RANSOM BALCOM.
 " 2. DOUGLASS BOARDMAN.
 " 3. JOHN M. PARKER.
 " 4. WILLIAM MURRAY, JR.

SEVENTH JUDICIAL DISTRICT.

- " 1. E. DARWIN SMITH.
 " 2. THOMAS A. JOHNSON.
 " 3. JAMES C. SMITH.
 " 4. CHARLES C. DWIGHT.

EIGHTH JUDICIAL DISTRICT.

- " 1. RICHARD P. MARVIN.
 " 2. GEORGE BARKER.
 " 3. JOHN L. TALCOTT.
 " 4. CHARLES DANIELS.

JUSTICES DESIGNATED TO HOLD THE GENERAL TERMS.

- | | | |
|---------------------------|--|-----------------------|
| <i>First Department.</i> | DANIEL P. INGRAHAM, Presiding Justice. | |
| | ALBERT CARDOZO, | } Associate Justices. |
| | GEORGE G. BARNARD, | |
| <i>Second Department.</i> | JOSEPH F. BARNARD, Presiding Justice. | |
| | JASPER W. GILBERT, | } Associate Justices |
| | ABRAHAM B. TAPPEN, | |
| <i>Third Department.</i> | THEODORE MILLER, Presiding Justice. | |
| | PLATT POTTER, | } Associate Justices. |
| | JOHN M. PARKER, | |
| <i>Fourth Department.</i> | JOSEPH MULLIN, Presiding Justice. | |
| | THOMAS A. JOHNSON, | } Associate Justices. |
| | JOHN L. TALCOTT, | |

MARSHALL B. CHAMPLAIN, *Attorney General*.

CASES

REPORTED IN THIS VOLUME.

A		Cox v. James, ...	144
Allen, Savage v.		Craig, Flint v.	819
American Exchange Bank, Lud-		D	
low v.		Darrin, Fiedler v.	651
291		Davis, The People ex rel. v. Gard-	
B		ner, ...	198
Bailey v. Buell, ...		Dod v. The Fourth National Bank	
158		of New York, ...	265
——, Smiley v.		Drew, Wallace v.	418
80		Durfee, Scott v.	890, note.
Bank of Albion, Pope v.		E	
226		Erie and Genesee Valley Railroad	
Belden, Wood v.		Company, The People ex rel.	
549		v. Tubbs, ...	401
Boyce, Harden v.		Erie Railway Company, Stein-	
425		way v.	645, note.
Brown v. Cherry, ...		F	
628		Fash, Nicoll v.	275
——, Terwilliger v.		Fiedler v. Darrin, ...	651
9		Fisk, Jeslyn v.	308
Buell, Bailey v.		Flint v. Craig, ...	819
158		Foot v. Webb, ...	88
Burns v. The People, ...		Fort v. McCully, ...	87
581		Fourth National Bank of New	
C		York, Dod v.	265
Capwell, O'Brien v.		Fuller v. Rowe, ...	844
497			
Carey v. Gnant, ...			
574			
Carow v. Kelly, ...			
289			
Carter, Taft v.			
67			
Case v. The Northern Central			
Railway Company, ...			
644			
Champlin, Whedon v.			
61			
Cherry, Brown v.			
628			
Clark, The People ex rel. v. Nor-			
ton, ...			
169			
Comstock, Parks v.			
16			
Conway, Gould v.			
355			

G

Gardner, The People ex rel. Davis v.	198
Gelpcke v. Quantell, ...	250
Gnant, Carey v.	574
Gould v. Conway, ...	855
Graham v. Selover, ...	813
Grand Trunk Railway Company, Keeney v.	104

H

Harden v. Boyce, ...	425
Heavy, Tuttle v.	834
Holt v. Ross, ...	554
Hulbert, The People ex rel. White v.	446

J

James, Cox v.	144
Joslyn v. Fisk, ...	808

K

Keeney v. The Grand Trunk Railway Company, ...	104
Kelly, Carow v.	289
King v. Whaley, ...	71
Kinney, Pierce v.	56
Kobbe, Smith v.	289

L

Lewis, The People ex rel. v. White, ...	666
Livingston v. Rendall, ...	493
Ludlow v. The American Exchange National Bank, ...	509

M

McCully, Fort v.	87
McGregor, Marshall v.	519

McKinley v. Tucker, ...	98
Marshall v. McGregor, ...	519
Matter of Remsen, ...	817
——— Treacy, ...	525
Mayor &c. of New York, Schuchardt v.	295
Merchants' Bank v. Scott, ...	641
Miller v. White, ...	434
Moor, Tift v.	619

N

Nelson, Osborn v.	875
New York Life Insurance Co., Sands v.	556
Nicoll v. Fash, ...	275
Northern Central Railway Co., Case v.	644
Norton, The People ex rel. Clark v.	169

O

O'Brien v. Capwell, ...	497
Osborn v. Nelson, ...	875

P

Parks v. Comstock, ...	16
People, Burns v.	531
———, ex rel. Clark v. Norton, ..	169
———, ——— Davis v. Gardner, ..	198
———, ——— The Erie and Genesee Valley R. R. Co. v. Tubbs, ..	401
People, ex rel. Lewis v. White, ...	666
———, ——— White v. Hulbert, ..	446
Pierce v. Kinney, ...	56
Pope v. The Bank of Albion, ...	226

Q

Quantell, Gelpcke v.	250
---------------------------	-----

R

Remsen, matter of, ...	817
Rendall, Livingston v.	493

CASES REPORTED.

vii

Ross, Holt v.	554
Rowe, Fuller v.	344
Rugg v. Spencer, ...	383

S

Sands v. New York Life Insurance Co., ...	556
Savage v. Allen, ...	291
Schuchardt v. The Mayor &c. of New York, ...	296
Scott v. Durfee, ...	390, note.
—, The Merchants' Bank v.	641
Selover, Graham v.	313
Smiley v. Bailey, ...	80
Smith v. Kobbe, ...	289
Spencer, Rugg v.	383
Steinway v. The Erie Railway Co., 645, note.	

T

Taft v. Carter, ...	67
Terwilliger v. Brown, ...	9
Tift v. Moor, ...	619
Treacy, matter of, ...	525

Trustees of Union College v. Wheeler, ...	585
Tubbs, The People ex rel. The Erie and Genesee Valley Railroad Co. v.	401
Tucker, McKinley v.	98
Tuttle v. Heavy, ...	334

U

Union College v. Wheeler, ...	585
---------------------------------	-----

W

Wallace v. Drew, ...	413
Webb, Foot v.	38
Whaley, King v.	71
Whedon v. Champlin, ...	61
Wheeler, Trustees of Union College v.	585
White, Miller v.	434
—, The People ex rel. v. Hulbert, ...	446
—, The People ex rel. Lewis v.	666
Wood v. Belden, ...	549
Wright v. Wright, ...	505

CASES
 IN
Law and Equity
 IN THE
S U P R E M E C O U R T
 OF THE
STATE OF NEW YORK.

**DEBORAH ANNE ERWILLIGER vs. JAMES H. BROWN and
 others.**

A trustee, making a sale of the trust property, cannot become a purchaser on his own account, either directly or through the agency of another.

Thus, if an executor, selling property under the order of the surrogate, for the payment of debts, becomes himself interested in a purchase thereof made by one employed by him to act as auctioneer, and who thus becomes his sub-agent, a residuary devise may come into a court of equity, and set aside the sale, and have the property resold.

Upon a sale of lands by an executor, under the order of the surrogate, for the payment of debts, B., acting as auctioneer, struck off the premises to himself. Before the completion of the sale, the payment of the purchase money, or the delivery of the deed to B., an arrangement was made between him and the executor, by which the latter became equally interested with the former in the purchased property. The sale was subsequently confirmed by the surrogate, and conveyance of the premises executed by the executor to B., who, on the same day, conveyed an equal undivided half of said premises to the executor, so that neither B. nor the executor could be protected against the claims of those interested in the estate directed to

 Terwilliger v. Brown.

be sold; the purchase being a palpable violation of the statute, and in direct hostility to the well established principle, that a trustee shall not be allowed, directly or indirectly, to speculate out of the trust property, or to become a purchaser thereof for his own benefit.

THIS was an action brought by a residuary devise, to set aside a sale of certain real estate of Joseph Ellis, deceased, made by order of the surrogate of Ulster county, upon the application of David Ellis, the executor of said Joseph, for the payment of debts.

The cause was tried at the Ulster circuit on the 21st day of January, 1863, by the court, without a jury. The facts found by the court, and the conclusions of law, are substantially as follows: That the will of Joseph Ellis, deceased, was duly admitted to probate by the surrogate of the county of Ulster, and letters testamentary issued thereon on the 11th day of June, 1861, to David Ellis. That on the 1st of day October, 1861, an order was made establishing the debts at \$276.23, and a further order made, upon the same day, authorizing the executor, David Ellis, to sell the real estate for the non-payment of debts. That on the 25th day of November, 1861, the defendant Brown, officiating as auctioneer, struck the premises off to himself for the sum of \$615. That after the action, and before the presentation of the report to the surrogate, and before the confirmation of such sale by the surrogate, before the payment of the purchase money, and before the delivery of the deed to Brown, an arrangement was made by and between the said Brown and David Ellis, the executor, by which the said Ellis became equally interested with the said Brown, in the purchase of the property. That on the 10th day of December, 1861, the defendant David Ellis, presented his report of sale to the surrogate, whereby he reported that the property had been sold to James H. Brown, for the sum of \$615; that fifteen per cent had been paid down, and the balance was to be paid upon the delivery of the deed; that on the said 10th day of Decem-

Terwilliger v. Brown.

ber, the surrogate made an order confirming said sale, and directing a conveyance to the purchaser. That on the 14th day of December, 1861, David Ellis, as executor, executed a deed to James H. Brown for said premises, for the consideration therein expressed of \$615; that on the same day the said Brown, by deed, conveyed the one equal undivided half part of said premises to said David Ellis, for the consideration as therein expressed of \$307.50. Both deeds were acknowledged on the same day, and before the same officer. That on the 10th day of January, 1862, the defendants Ellis and Brown, with their wives, in consideration of \$600, conveyed by quit-claim to the defendant Sarah Jane, wife of David Berrian, about five acres of the premises of Joseph Ellis, deceased, and purchased upon said sale. That on the 22d day of January, 1862, the defendants Brown and Ellis, with their wives, for the consideration of \$400, sold and conveyed to Hannah Deyo another portion of said premises. That the balance of the premises, about thirty-three acres, are still in the hands of Brown and Ellis, owned by them. That the defendants have realized in money and securities, upon the aforesaid sales of portions of said premises, and also from the proceeds of wood, timber and hoop poles as aforesaid, about the sum of \$900.

From the foregoing facts the judge drew the following conclusions, to wit: That the plaintiff, Deborah Ann Terwilliger, was entitled to the one undivided seventh part of the property whereof Joseph Ellis died seised. That the sale and conveyance by David Ellis, the executor, to James H. Brown, and the conveyance by Brown to Ellis, of the undivided half part thereof, were both fraudulent and void as against the plaintiff, Deborah Ann Terwilliger, and the devisees of the said Joseph Ellis, deceased. That as to so much of the real estate of Joseph Ellis, deceased, as was not conveyed to Hannah Deyo and Sarah Jane Berrian, the plaintiff, Deborah Ann Terwilliger, was enti-

Terwilliger v. Brown.

tled to the one undivided seventh part thereof, in fee, in the same manner and to the same extent as if such executor's deed had never been executed. That the defendants Brown and Ellis should account and pay over to the plaintiff, Deborah Ann Terwilliger, the one seventh part of the proceeds of the sale of the real estate, and of the wood and poles cut thereon. Judgment having been entered in conformity with the decision of the judge, the defendant Brown appealed to this court.

T. B. Westbrook, for the appellants.

M. Schoonmaker, for the respondent.

By the Court, INGALLS, J. The principal question arising upon the facts found in this case, is whether Brown and Ellis acquired a valid title to the property sold at the executor's sale. Ellis was the executor, and Brown was his surety, and the auctioneer who sold the property by the procurement of Ellis. Previous to the confirmation of the sale, by the surrogate, Brown contracted with Ellis to sell and convey to him one undivided half of the premises; which contract was consummated by a conveyance by Brown to Ellis subsequent to such confirmation, and upon the same day that Ellis, as executor, conveyed to Brown the premises sold at the executor's sale. The Revised Statutes (vol. 2, p. 109, § 27, *Edm. ed.*) provide as follows: "The executors or administrators making the sale, and the guardian of any minor heirs of the deceased shall not directly or indirectly purchase, or be interested in the purchase of, any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void. But this section shall not prohibit any such purchase by a guardian for the benefit of his ward." The salutary principle contained in this provision of the statute, in its application to trustees, in regard to the sale of property held

Terwilliger v. Brown.

in trust, has received the repeated sanction of the courts, and has been rigidly enforced. The revisors accompanied their original report of this section with the following note: "The general principle, that a trustee shall not purchase the trust property extended so as to make the *purchase void*." In *De Caters v. Le Ray De Chaumont*, (3 Paige, 179,) the chancellor remarks: "It is the settled law of the court, that the trustee for a sale cannot become a purchaser on his own account, or as the agent of another, or through the agency of another." In *Davoue v. Fanning*, (2 John. Ch. 257,) Chancellor Kent says: "If a trustee, acting for others, sells an estate and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here as of course, and set aside the purchase, and have the property re-exposed to sale," (p. 260.) "However innocent the purchaser may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself." In *Hawley v. Cramer*, (4 Cowen, 735,) the court remark: "And the fact that the purchase was made by the trustee through the intervention of a third person, or that the trustee purchased as the agent for another, makes no difference in the legal effect of the transaction, or in the application of the general rule." In *Oonger v. Ring*, (11 Barb. 364,) it is said: "The rule is to be enforced with unrelenting rigor, and is not to be limited in its application to those cases where the trustee himself sells the estate. The object is to afford the *cestui que trust* the most ample protection against fraud and injustice, and remove out of the way of the trustee all inducements to profit by his superior knowledge, and all temptation to speculate upon property which he is under the most binding obligation to manage and sell to the best advantage of others." In *Moore v. Moore*, (5 N. Y. 256,) it is said: "The law does not stop to speculate upon the probabilities that the agent has resisted temptation;

Terwilliger v. Brown.

it removes the temptation, by proclaiming in advance that he shall not acquire the property." (*Story's Eq. Jur.* § 322.) "Indeed the doctrine may be broadly stated, that executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate." (*Willard's Eq. Jur.* 189.) "But it is a rule which applies universally to all who come within the principle, which principle is that no party can be permitted to purchase an interest in property and hold it for his own benefit, *when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, or for his individual use. And a sub-agent is just as much disqualified as an agent is, to make a purchase in opposition to the rights and interests of his principal.*"

I have cited freely from the adjudged cases, for the purpose of showing the extent to which this principle is applied, and the jealousy with which such transactions are viewed by the courts. Brown was procured by Ellis, the executor, to sell the property as auctioneer, and thereby became a sub-agent of Ellis, and upon principle would seem to be within the spirit of the prohibition so firmly established and rigorously enforced by the courts, and therefore should not have been allowed to purchase the premises, even for his own benefit. It is an undisputed fact that Ellis contracted for an undivided half of the property previous to the confirmation of the sale by the surrogate, until which confirmation the sale was incomplete, and no title passed to the purchaser. (2 *R. S.* p. 103, §§ 29, 30. *Dayton's Surrogate*, p. 611, 3d ed. *Rea v. McEachron*, 13 *Wend.* 465.) Previous to the confirmation, Brown was not in such sense the owner of the premises as to enable him to make a valid sale thereof. He had not paid the purchase money, nor had the deed been delivered, at the

Terwilliger v. Brown.

time Ellis bargained for an interest in the property, and hence *Ellis contracted for such interest before the title had passed from the estate to Brown*, and while he (Ellis,) as such trustee, had control thereof, subject to the action of the surrogate's court. In every view which can be taken of the transaction, it is quite apparent that neither Brown nor Ellis can be protected, as the purchase was a palpable violation of the statute, and in direct hostility to the well established principle that a trustee shall not be allowed, directly or indirectly, to speculate out of the trust property, or to become a purchaser thereof for his own benefit.

I do not think a fatal error was committed in admitting Isaac Terwilliger as a witness. He was, at the time of his admission, a party to the action. Again; it is obvious from his own testimony, and from the manner it was disposed of by the court, that no possible injury resulted to the defendants from his admission as a witness. (*Best v. Starks*, 24 *How. Pr.* 58, 61.)

The judgment appealed from should be affirmed, with costs.

[ALBANY GENERAL TERM, December 5, 1864. *Peckham, Miller and Ingalls*, Justices.]

PARKS vs. COMSTOCK.

A transfer of stock, absolute and unconditional in its terms, expressing a consideration, and vesting in the assignee a complete and perfect title to the interest of the assignor in such stock, and a written memorandum of the transaction, of the same date, signed by the same parties and a third person as surety for the assignee, executed and delivered at the same interview and in response to a demand of the assignor, for a memorandum of the transaction, must be regarded as delivered at one and the same time, for the same purpose, and should be deemed different parts of the same instrument, and construed together.

And such memorandum, being a part of the assignment, and the two one instrument, a seal to each is unnecessary; one seal will suffice for both. If a separate instrument, and executed even after the assignment, it would operate as a defeasance, in equity, and, (since the Code,) at law, though not under seal.

As one instrument with the assignment, such a memorandum is sufficiently stamped by placing the proper stamp upon the assignment; as a separate instrument, a stamp may be affixed to it and canceled on the trial.

Such a memorandum is not inoperative as a defeasance because executed by the assignee together with a third party; where it contains two parts—one defining the object and the purpose of the assignment, and the other covenanting to indemnify against costs—and the third party is only a surety for the performance of the covenant of indemnity.

P. & B. being copartners, under the firm name of P. & Co. held the title to 198 shares of the stock of a corporation, in which C. & W. were also stockholders. P. desiring a dissolution and an adjustment of the firm matters, assigned to C. his interest in such stock, C. agreeing to take legal measures to effect a settlement of the partnership, and ascertain the value of P.'s interest in such stock. As a consideration for such assignment, and to continue P. as a stockholder and director of the company, C. transferred to him ten shares of other stock owned by him, with an agreement that pending the settlement with B. each should receive the dividends of the stock; and then providing for the disposition of the stock—its amount being ascertained—as follows: If it exceeded \$1000 over and above the costs and expenses of its ascertainment, the surplus to remain for future disposal. If the interest was not enough to cover \$1000 and costs, the costs were to be paid, and the balance to be assigned to P., who was to reassign to C. the ten shares. If P. had no interest in the stock, then he was to reassign the said ten shares to C., and C. was to pay all costs and expenses.

Held, 1. That the fair construction of the agreement was, that if any overplus remained from the interest in the 198 shares, after defraying the costs of the litigation and reimbursing C. for the ten shares assigned to P., it was in some manner to be divided between them.

2. That the assignment was a valid transfer to C. of P.'s interest in the 198 shares of stock; and that as the defeasance showed it was transferred to en-

Parks v. Comstock.

able C. to ascertain the extent of that interest, and if found to be of any value, the same was to be disposed of, between them, C. had an interest in such stock.

3. That by the assignment C. became a trustee, coupled with an interest, for whatever should be adjudged to belong to P. as a member of the firm of P. & Co.; and as such, he had the legal title; and being interested, that P. could not settle and adjust the affairs of the partnership without C.'s assent.
4. That in the absence of any evidence of delay or violation of agreement by C., or showing that he was not endeavoring by proper means to ascertain the interest of P. in the 198 shares of stock, an action could not be maintained by P. against C. to compel a reassignment by the latter to the former, of the plaintiff's interest in the 198 shares of stock, on the ground that it was a trust in the hands of the defendant, for a specific purpose, which purpose had been accomplished, or if not, which purpose had been revoked; because, (1.) There was no such fraud established as would justify the setting aside of the assignment, or declaring it void. (2.) Because C. having assumed responsibility, incurred costs and performed services, had such an interest that P. could not revoke the assignment, settle the copartnership matters, and determine what interest he had as such partner, in the 198 shares of stock, without the assent of C. (3.) Because, if C. had no interest, even, and if the power of revocation did exist, actions having been commenced by and against him, in relation to the matter, P. could not revoke the assignment, without tendering an indemnity against such actions, for all costs and damages, as well as tendering a reassignment of the ten shares.

APPPEAL from a judgment entered upon the report of a referee.

The plaintiff was a member of the copartnership firm of S. A. Parks & Co., the affairs of which were in an unsettled condition. The firm owned 198 shares, of \$100 each, of the capital stock of the Pioneer Paper Company. On the 16th of June, 1863, the plaintiff, by an instrument in writing, under seal, expressing a consideration of \$1000, transferred all his right and title to the said stock, to the defendant; the plaintiff covenanting that he was the owner, either legal or equitable, of the stock thus assigned. At the same time the defendant transferred to the plaintiff ten shares of the stock of the same company. On the same occasion the parties and one William Wilson executed, without seal, an instrument in the following words and figures:

Parks v. Comstock.

"Memorandum of an agreement made this 17th of June, 1863, between Elisha Comstock of the first part, Solomon A. Parks of the second part, and William Wilson of the third part, witness: That whereas, Comstock, on the 16th inst. sold and assigned to Parks ten shares of the capital stock in the Pioneer Paper Company. Also, whereas, Parks and one Coe S. Buchanan being equal partners under the firm of S. A. Parks & Co., in 1859 took 198 shares of the capital stock of said company, and Parks this day has sold and assigned to Comstock, all his right, title and interest (which he claims is an equal half) to and in said 198 shares, with the understanding that Comstock is to take legal measures to effect a settlement between the parties to the said company partnership of S. A. Parks & Co., and thereby ascertain the value of said interest in said stock. Also, whereas, Comstock and Wilson have agreed to indemnify Parks against costs in a certain contingency. Now, therefore, Comstock and Parks agree, that during the pendency and until the settlement is effected with Buchanan they will each draw the dividends of said stock as if the said assignment had not been made.

Also, it is further agreed, that on the said interest or value of said stock being ascertained, in case it exceeds the sum of one thousand dollars, and costs and expenses incurred in the investigation, settlement, &c., the surplus shall remain for future disposal; and in case it is not sufficient to cover said sum, costs, &c., and still enough to pay said costs, the balance to be assigned to Parks, after costs paid, and the Comstock \$1000 to be reassigned to him.

Also, it is agreed, that in case it turns out that Parks has no interest in said stocks, Parks is to reassign said \$1000 to Comstock, and Comstock and Wilson are to save Parks against the payment of any part of said costs, ex-

Parks v. Comstock.

penses, &c., which Wilson and Comstock hereby agree to in consideration of one dollar and the premises.

Witness our hands and seals the day and year first above written."

Shortly after the execution of this agreement, Buchanan having procured the stock belonging to the firm of S. A. Parks & Co. to be transferred to his individual name, Comstock commenced an action against him and the Pioneer Paper Company, for the purpose of having such transfer declared fraudulent and void, and scrip issued to Buchanan canceled, and new scrip therefor issued to Comstock and Buchanan jointly; in which action Comstock succeeded, and the prayer of his complaint was granted. Comstock did not commence any action for the settlement of the affairs of S. A. Parks & Co., but on the 7th of November, 1863, an action for that purpose was commenced by Buchanan against both Comstock and Parks, which action is still pending and undetermined.

It was alleged in the complaint in this action, and not denied by the answer, that the defendant intended to hold and appropriate the stock to his own use, and that he threatened and intended to draw the dividends thereon and to have scrip therefor issued in his own name.

The complaint also contained allegations of fraud and mistake in the execution of the agreement, and stated that the same was not stamped as required by the revenue act, but that the assignment executed by the plaintiff had affixed thereto a twenty-five cent stamp. It also contained an offer to pay the defendant all costs and expenses to which he was entitled under the contract. And for relief the plaintiff asked that the assignment of the 198 shares of stock be declared fraudulent and void, and that the same might be canceled, and that the defendant be adjudged to reassign the same; and that an account be taken of the costs and expenses chargeable to the plain-

Parks v. Comstock.

tiff under the contract; and the complaint concluded with a prayer for general relief.

The action was tried before a referee.

No evidence was given, on the trial, in support of the allegations of fraud or mistake. The agreement was produced and stamped in the presence of the referee, according to the provisions of the revenue act of the 30th of June, 1864. The plaintiff produced in court, and tendered to the defendant a reassignment in due form and duly executed, of the ten shares of stock assigned by the defendant to him, which reassignment was not accepted or received by the defendant.

Upon the facts so proved, and upon the uncontroverted allegations of the complaint, the plaintiff rested the case, and the same was submitted to the referee, who held and decided as matter of law, that the pleadings and proof did not entitle the plaintiff to any relief whatever, and that the complaint must be dismissed.

Judgment of dismissal was accordingly entered, and the plaintiff appealed.

A. C. Paige and *D. L. Seymour*, for the appellant.

I. Any mistake in regard to the want of revenue stamp on the second paper, was properly remedied on the trial, under the last act of congress, by affixing the stamp and cancelling it in the presence of the court. The instrument was executed before the passage of the act of congress of June 30, 1864, in relation to revenue, and section 163 of that act provides for affixing a stamp, as was done in this case, upon any instrument to which the stamp is wanting. But it required no stamp. The two papers are to be regarded as one instrument—one contract—and it is not necessary that a stamp should be placed upon each piece of paper on which the contract is written, but only that there should be affixed to the contract stamps to the amount of five cents for each piece of paper. A sufficient

Parks v. Comstock.

stamp for both parts of the contract was placed upon the first piece of paper executed.

II. The two pieces of paper, "A" and "No. 1," are to be taken together as constituting one agreement. They were executed contemporaneously, refer to each other, each is limited by the other, and both are parts of one agreement. The allegations in the complaint show both papers to be but one instrument. The exceptions taken to the refusals of the referee to find, as requested, that these instruments "must be construed together as one instrument," and that "No. 1 is to be construed as a part of the whole contract, notwithstanding the seals are omitted" are, therefore, well taken. (*Hanford v. Rogers*, 11 Barb. 18. *Cornell v. Todd*, 2 Denio, 130; see opinion of *Bronson, J.*, and cases cited.) In the case, 11 Barb. 18, one paper was sealed and the other was not.

From the two parts of this *one contract*, it appears to be a transfer to Comstock of the interest of Parks in the 198 shares of the stock of the said paper company, with a condition or stipulation requiring that stock to be reconveyed by Comstock to Parks as soon as a settlement of the copartnership affairs of S. A. Parks & Co. should be "effected with Buchanan." Upon ascertaining the interest or value of the stock of Parks so transferred, in case it exceeded \$1000 and costs, and expenses of investigation, &c., the surplus was to be re-transferred to Parks; but if its value should not be sufficient to cover the \$1000 costs, &c., and yet enough to pay the costs, then the balance was to be reassigned to Parks after he should have paid the costs, and then also the ten shares assigned by Comstock to Parks were to be reassigned to Comstock. If it should turn out, however, that Parks had no interest in the stock, then Parks was to reassign the said ten shares to Comstock, who was in that event to indemnify him against costs.

IV. Such instrument, whatever it may be called, operated not to transfer the property absolutely, but merely

Parks v. Comstock.

to place in the hands of Comstock the formal title to the unascertained and undefined interest of Parks in the 198 shares; and on that interest being ascertained, it was (subject to certain deductions specified in the instrument itself) to be reassigned to Parks. In all cases where the owner of property does not part with its possession absolutely, but conveys it conditionally, or in trust for certain purposes, or to an agent for specific uses, or by way of mortgage, or to be held as security against some loss, a court of equity will take cognizance of the matter, and will enforce the rights of the parties according to their equities, under their agreement, and will protect either party against injustice from the other. A deed conveying lands with a condition that such conveyance shall be void if the grantor pays certain legacies charged on other lands, is in the nature of a mortgage; and the remedies upon it are in equity. (*Stewart v. Hutchins*, 13 *Wend.* 485.) So an absolute bill of sale of personal property may be shown either by a separate writing or by parol to be subject to a defeasance, and equity will enforce the rights of the parties accordingly. (1 *Pars. on Cont.* 452, n. xx. *Read v. Jewett*, 5 *Greenl.* 96, and cases cited in said note in *Parsons*.) In all cases of the mortgage of personal property the mortgagor has an equity of redemption. (*Mattison v. Baucus*, 1 *N. Y.* 297. *Hill v. Bebee*, 13 *id.* 565. *Smith v. Quartz Co.*, 14 *Cal.* 242, cited 21 *U. S. Dig.* 289, § 284.) In all cases of trusts, where the purposes of the trusts have been answered, if any part of the property remains undisposed of, it reverts to its lawful owner. In all cases of property placed as security or indemnity against loss, when the occasion has passed, or the indemnitee has been paid or tendered his losses, costs and expenses, the right to the possession of the property held as security results to the owner. In cases of agency, where the agency is not coupled with an interest, the principal may at any time revoke the agency and resume the pos-

Parks v. Comstock.

session of any property in his hands. And in case of an agency coupled with an interest, the principal may, under the direction of the court, ascertain the extent of that interest and relieve his property from the control of the agent. An equity of redemption is like a trust estate. (*Willard on Real Estate*, 143.) A mortgage is a mere security for the debt. (*Id.* 116.) An instrument once a mortgage is always a mortgage, and the mortgagor has always his right of redemption. (*Clark v. Henry*, 2 Cowen, 324.)

V. Whether Comstock held the interest of Parks in the 198 shares as mortgagee, trustee, agent, or in any other character, the contract shows that he held it only to indemnify him against the costs and expenses he might incur in any legal proceedings to ascertain the quantum of Parks' interest in these shares.

VI. Upon another ground, independent of the construction of this agreement as to the contingency upon the happening of which the plaintiff's interest in the stock was to be reassigned, the plaintiff insists that he is entitled to a reassignment of the stock upon an accounting, and the payment to the defendant of his costs, expenses, &c., and a reassignment to him of his ten shares.

The contract between the parties made the defendant the mere agent of the plaintiff to effect a settlement with Buchanan, and thereby ascertain the plaintiff's interest in the stock. He was constituted such agent, and took upon him the agency the 17th of June, 1863. The contract gave him no interest in the stock, except the nominal ownership, for the purpose of performing his duties under the contract. He was not even provided with a compensation for his services in the duty which he assumed. He was only to be paid his "costs and expenses incurred in the investigation, settlement," &c. The referee is mistaken in supposing that Comstock transferred his \$1000 of stock in consideration of Parks transferring his interest in the

Parks v. Comstock.

198 shares. The contract shows that the ten shares were transferred by Comstock to Parks in consideration of \$1000, which he acknowledges has been paid to him, and paper No. 1 provides that in a certain contingency the Comstock \$1000 shall be reassigned. Thus it appears that "the Comstock \$1000," if not already paid for, as certified by the agreement, is to be reassigned to him, or he is to be paid for it, and in no event can he be the loser. Comstock, in violation of his duty, commenced no action against Buchanan to effect a settlement, &c., previous to the commencement of this suit on the 21st day of July, 1864, more than a year after taking upon himself the duty of agent for that purpose. On the other hand, in defiance of the contract and his duties under it, Comstock claimed to be the absolute owner of the whole of Parks' interest in this stock, not subject to any right of Parks whatever. This is alleged in the complaint, and not denied, but actually claimed in the answer. The plaintiff having ascertained this intention of the defendant, and having waited a reasonable time, to wit, eight months, for him to proceed with the discharge of his duty under the contract, rescinded the contract, offering, at the same time, to return the ten shares of stock which he had received from Comstock, pay all his costs and expenses, and to do any other act to place him, Comstock, where he was when the contract was made. In this the plaintiff was right, as Comstock stood in no other relation to him than a clerk, laborer, or any agent whatever, who, if not performing his duty can be discharged, and is thereupon bound to redeliver to the principal the property placed in his hands for the discharge of his duties.

VII. It is inequitable and unreasonable to require the plaintiff to permit this property still to remain in the hands of Comstock, because Comstock commenced a suit against Buchanan and the paper company, on the 6th day of July, 1863, for the purpose of compelling Buchanan to

Parks v. Comstock.

re-transfer to him, Comstock, and Buchanan the said stock which Buchanan had caused to be entered in his individual name on the books of the company, and for no other purpose. Nor because Buchanan himself, more than five months after the contract was made between himself and the plaintiff, commenced a suit for an accounting and settlement of the firm matters of S. A. Parks & Co. The whole object in putting the stock in his hands was that he, as an actor, should procure a settlement of the affairs of S. A. Parks & Co., and not leave it to others to do.

VIII. The plaintiff is not concluded or barred of any right of property or action by the judgment in the case of Comstock against the paper company and Buchanan, commenced the 6th of July, 1863, in which the judgment was entered in March, 1864, as the plaintiff was not a party to that action. Nor, by anything that has since transpired in the suit commenced on the 27th of November, 1863, by Buchanan against Comstock and Parks, which is not yet tried; and in which Parks has put in no answer, and which cannot settle the questions litigated in this suit between Parks and Comstock.

A. Pond, for the respondent.

I. The case, as made by the complaint, is one for fraud, and it is an entire failure of proof to endeavor to sustain it, on an affirmance of the agreement which the action was brought to set aside and to rescind, for the fraud alleged. The causes of action are inconsistent. (*Code*, § 171. *Walter v. Bennett*, 16 N. Y. 250. *Ransom v. Wetmore*, 39 Barb. 104. *Mayor v. Parker Vein Co.*, 21 How. 289. *Lloyd v. Brewster*, 4 Paige, 537. *Cox v. Platt*, 32 Barb. 126, 130. *Williams v. Ayrault*, 31 id. 364, 367. *Bradley v. Aldrich*, 40 N. Y. 504. *Coleman v. Second Av. R. R.*, 38 id. 202. *Towle v. Jones*, 19 Abb. 455. *Bush v. Tiley*, 49 Barb. 599.)

II. But if there was not an entire departure from the

Parks v. Comstock.

complaint, the plaintiff cannot recover. 1. The plaintiff, in court, fully ratified the contract, if it was capable of ratification, and therefore he is estopped now to ask to have it rescinded. This action to rescind it was brought in July, 1864, and the agreement was attempted to be ratified on the 2d of February, 1865. If, therefore, it was competent to ratify it, still it could not be ratified so as to give the plaintiff a cause of action thereon, previous to the ratification. This the law of congress does not assume to do, and the law is, it cannot be done. (*Gorham v. Gale*, 7 Cowen, 739. *Watson v. Thibon*, 17 Abb. 184.) 2. But the supposed unsealed defeasance was void and inoperative to do away with the absolute assignment under seal. (a.) It was not stamped, and was therefore void. (See decision in *Comstock v. Buchanan*, 57 Barb. 582.) (b.) Being void, the law settled the rights of the parties to that contract at the time, and vested an absolute title in an undivided half of the stock in the defendant, and no law of congress which assumes to take away such vested right is valid. The plaintiff's attorney concedes that congress has no power to pass a law impairing a vested right created by a contract, and if that is so, (and it must be so,) the law is void and inoperative, so far as this assignment is concerned. (c.) But the defeasance was unsealed, and hence was inoperative to qualify the absolute nature of the sealed transfer. This was expressly decided in reference to this very paper, in the case of *Comstock against Buchanan*, which should be followed here. (*Bronson v. Fitzhugh*, 1 Hill, 185. *Howard v. Cooper*, Id. 44. *Nelson v. Sharp*, 4 id. 584. *Durgin v. Ireland*, 14 N. Y. 322. *French v. New*, 28 id. 147.) The plaintiff's counsel is incorrect in saying that no case could be found holding as above, where the defeasance was executed at the same time. (See *Fitzhugh v. Bronson*, supra.) He is also mistaken in supposing that this paper, called a defeasance, was executed at the same time with the other. On the contrary, it was exe-

Parks v. Comstock.

cuted afterwards, and recites the prior absolute sale and transfer of the stock as a completed transaction. (*Mann v. Witbeck*, 17 Barb. 388.) Besides, it was a subsequent, separate and distinct contract from the sealed transfer, and cannot be construed in connection with the sealed assignment of the stock from Parks to Comstock, for the reason that Wilson was a party to the last agreement, and was not a party to the former. In order to come within the principle contended for by the plaintiff's counsel, the two writings must be between the same parties, and no other. Because, to be but one contract, they must be such papers as they would be if signed by the whole, and are obligatory upon each; but Wilson was no party to the prior assignment, either of Parks or Comstock, and hence cannot, by construction, be made a party to them. (*Craig v. Wells*, 1 Kern. 315.) Now, to avoid this position, the plaintiff's counsel cites *Hanford v. Rogers*, (11 Barb. 18.) But that case was not a case of a defeasance at all. It was a case where the defendant had transferred a chose in action—a bond—and indorsed a guaranty thereon, without expressing any consideration in the guaranty, and the court held that, being executed at the same time with an assignment under seal, it was supported by the consideration of the assignment. That is all. And in order to effect this the court adopted the principle alluded to, that two papers being executed at the same time, in relation to the same subject matter, should be construed together, and thus make but one entire agreement. But this case and the doctrine enunciated in it, so far as this question is concerned, was exploded long since. (*Brewster v. Silence*, 4 Seld. 207. *De Ridder v. Schermerhorn*, 10 Barb. 638. *Allen v. Fosgate*, 11 How. 218.) These authorities hold that the two instruments make two contracts upon which the remedies are distinct and independent; and this accords with the case of *Bronson v. Fitzhugh*, (1 Hill, 185,) where Bronson, J., said that the remedy of the party for

Parks v. Comstock.

the breach of the collateral agreement was by action upon it. It will be seen, therefore, that the whole foundation on which it is sought to rest this case fails. (*d.*) But suppose the paper No. 1 was valid, what then? There has been no violation of it by the defendant. He brought a suit at once to set aside the fraudulent transfer of the stock by Buchanan to himself, owned by S. A. Parks & Co., for the purpose of clearing away the fraudulent obstructions in the way of an action to settle the accounts. He recovered in that action, and Buchanan appealed to the general term, where the judgment was affirmed, and then Buchanan appealed to the Court of Appeals, where the action is still pending. Soon after the commencement of this action by Comstock, and before the trial, Bullard commenced an action to settle the partnership matters of S. A. Parks & Co., and made both Parks and Comstock defendants, and that action is now pending, and indeed being tried. It is being defended by Comstock. No intimation but that it is being defended in good faith, and with a bona fide intention on Comstock's part to make the surplus as large as possible. Then why should the court interfere to stop him from carrying out his agreement? I insist there is no precedent for such an action.

III. But no ground is shown for the interference of equity to set aside the assignment of the stock by the plaintiff to the defendant, even if the paper No. 1 is held valid. 1. Equity will interfere to compel a reassignment of, or cancellation of the transfer of an instrument, only when the same was obtained by fraud, or some damage is to be apprehended by omitting to interfere; but no such ground is put forth here, nor does any exist. (*Willard's Eq. Jur.* 302-304. *Field v. Holbrook*, 6 *Duer*, 597. *Cox v. Clift*, 2 *Comst.* 118. *Scott v. Onderdonk*, 14 *N. Y.* 9. *Ward v. Dewey*, 16 *id.* 519.) And see *Hotchkiss v. Elting*, (36 *Barb.* 38.) 2. Suppose the paper No. 1 was valid, what then? The plaintiff executed it, and ratified it in open court.

Parks v. Comstock.

Then he is bound by it. It provides for a reassignment of this stock, in a "certain contingency," which has not yet arisen. Can he, in the face of his contract, get the stock he sold to the defendant back by a suit in equity, sooner than by the terms of the contract the defendant agreed to reassign it to him? The defendant also assigned stock to him. Could the defendant repudiate after getting half through with the litigation, and demand his stock back again from the plaintiff, if the latter refused? Certainly not; and this shows the case is not one of agency at all, but of purchase and sale. The defendant bought the interest of the plaintiff in the S. A. Parks & Co. stock, and the plaintiff purchased of the defendant \$1000 stock, and made a subsequent agreement to trade back at a certain time, not yet arrived, on the happening of a contingency, not yet existing. That is all. Why should any third person, or the court, be called in to set this agreement aside, while the defendant is performing his part of it, is responsible, and no fraud, accident or mistake pretended? It is a most extraordinary case for able counsel to present. A bill brought to set aside a contract of sale, where the defendant is entirely responsible, and no fraud, accident or mistake is charged. Under such circumstances the law is, that both parties are bound by the contract, and if the defendant should violate it, let the plaintiff sue on the agreement for a breach, or bring a bill for a specific performance. Those are the remedies open for an ordinary man upon a contract which the plaintiff himself ratifies and claims is valid. Should he have more remedies than an ordinary man, upon a valid contract? I insist not, and if not, his complaint was properly dismissed.

IV. But it is said the defendant was made but an agent of the plaintiff, by the agreement, and hence that the plaintiff could revoke the agency at any time. This is not so. 1. The defendant is no agent at all. This was decided expressly in the Comstock suit. The question is

Parks v. Comstock.

the same in this suit as it was in the former, and it would be entirely incongruous to have the same question decided differently in the two suits. 2. But if a party makes out a power of attorney, and revokes it, who ever heard that a bill in equity is proper to set aside a power of attorney in such a case, even though the attorney insists on acting under it. There is no precedent for it. 3. But if it is an agency, it is one coupled with an interest, and it is therefore irrevocable. It is for Comstock's interest to control the stock in the corporation, of which he is a member, or to neutralize Buchanan's influence there, and he is entitled to have that control as long as the agreement permits it. He transferred to get the right to \$1000 of stock, which, in a certain event, was never to come back to him again. Having possessed himself of that right for a valuable consideration, he is not to be deprived of it simply because the plaintiff elects to repudiate or rescind the agreement. Much less will a court of equity decree that he shall give it up without cause. No; the agency in such a case is irrevocable, as it is coupled with an interest, and was given upon a valuable consideration. *Story* says, in regard to this: "If, however, there be an express stipulation by the principal that the authority shall be irrevocable; or, if the authority be given for a valuable consideration, or be coupled with an interest, or be part of a security, the authority will be irrevocable, unless there be an express stipulation that it shall be revocable." (*Story on Cont.* § 192. 1 *Pars. on Cont.* 58. *Hutchins v. Hebbard*, 34 *N. Y.* 24.) Now, here, the contract of Parks was made upon a good and valuable consideration, the defendant has an interest in its performance, and in a certain event is not to reassign the stock to Parks, nor is Parks to reassign to the defendant the stock assigned to him by Comstock. Is all this to be revoked by Parks electing to repudiate the agreement? More than this. Can Parks repudiate after Comstock has got one lawsuit

Parks v. Comstock.

pending in the Court of Appeals, and a second in the Supreme Court, growing out of his agency, if agency it is, on an offer simply to pay his costs in one suit up to a certain time?

V. But as already intimated, if Parks could repudiate or revoke Comstock's agency, he could only do so by indemnifying him against the suits in the courts, growing out of this transfer, and in pursuance thereof. His bill is defective in not making such offer, and his case is also alike defective in not offering such indemnity. But, in truth, it is not a revocable agency at all. It is a mere purchase and sale between the parties, and not an agency, and therefore the plaintiff has no right to rescind the agreement at all. But if he has that right, he should assert it before commencing the action; an offer in the bill is not sufficient. (*Bruce v. Tilton*, 25 N. Y. 197.)

VI. Is there any need of the interference of equity here? None at all. It is said by one of the counsel that here is \$20,000 worth of property. This is an entire mistake. The fact is, Buchanan claims Parks don't own any interest in the stock, and Comstock, by the agreement, is bound to ascertain how that stands. But in any event the interest is not large. But whatever it is, is there any danger in letting Comstock go on, as the contract provides; and when the value of Parks' interest is ascertained, let Parks sue for it, if Comstock then withholds it from him. He is bound to wait till that time, by virtue of his agreement, and the court is not authorized to change, modify or cancel the agreement which the parties made.

VII. The report of the referee does not present any question for review in this court. 1. The referee has not stated what facts he found, so that the court can say whether his conclusion of law was correct or not. He has simply directed judgment for the defendant, without stating any other ground than that the evidence does not warrant any other judgment. This court cannot review

Parks v. Comstock.

such a finding. (*Bridger v. Weeks*, 30 N. Y. 328. *Penn. Coal Co. v. Canal Co.*, 31 id. 91, 101.) 2. Nor will this court review the decision of the referee refusing to find other facts than those found by him and stated in his report. (*Bissell v. Pearce*, 28 N. Y. 258. *Terry v. Wheeler*, 25 id. 524. *Casler v. Shipman*, 35 id. 542. *Priest v. Price*, 3 *Keyes*, 222. *Mosher v. Hotchkiss*, Id. 161. *Cady v. Allen*, 18 id. 574. *Brooks v. Van Every*, 3 *Keyes*, 27. *Lewis v. Ingersoll*, 1 id. 347.)

By the Court, JAMES, J. As this cause was tried before a referee, this court on appeal from the judgment may review the findings of fact as well as the conclusions of law. The action is prosecuted for the purpose of compelling a reassignment by the defendant to the plaintiff of the interest which the plaintiff as a member of the firm of S. A. Parks & Co., had on the 17th day of June, 1863, in 198 shares of the Pioneer Paper Company, and that day assigned to the defendant, on the ground that it was a trust in the hands of the defendant for a specific purpose, which purpose has been accomplished, or if not, which trust has been revoked.

The defendant denies the trust, and avers that the assignment was absolute and unconditional, for a valuable consideration.

The instrument of transfer set forth by the plaintiff and admitted by the defendant, expresses a consideration, and is in terms absolute and unconditional, vesting in the defendant a complete and perfect title to the interest of Parks, as a member of Parks & Co., to the 198 shares of the paper company stock. To overcome this absolute conveyance, the defendant offered in evidence a written memorandum, of the same date as the assignment, signed by the parties, and one Wilson as a surety for the defendant, without stamp or seal, claiming that the two instru-

Parks v. Comstock.

ments should be construed together as one instrument; in which case the latter would operate as a defeasance.

The reception of this written memorandum in evidence and its consideration in the case was strongly resisted, upon several grounds: 1st. Because it was not stamped. 2d. Because not under seal. 3d. Because uncertain and ambiguous. 4th. Because made subsequent to the agreement; and 5th. Because made in connection with a third party.

I hold that the two instruments must be regarded as delivered at one and the same time, for the same purpose, and should be held as different parts of the same instrument and construed together. They relate to the same transaction; the latter reciting, the former defining and declaring its object and purpose; they bear the same date; were executed and delivered at the same interview, the latter in response to a demand of one party for a memorandum of this transaction.

The objections to the admissibility of the memorandum in evidence, or its effect if admitted, are not well taken, and serve no purpose unless it be to give color to the allegation of fraud in the complaint. If the memorandum was a part of the assignment, and the two, one instrument, a seal to each was not necessary; one seal would answer for both. But if a separate instrument, and executed even after the assignment, it would operate as a defeasance in equity, and since the Code, at law, though not under seal. (*Slee v. Manhattan Company*, 1 Paige, 48. *Despard v. Walbridge*, 15 N. Y. 374-378.) As one instrument, it was sufficiently stamped; as a separate instrument, a stamp was properly affixed and canceled on the trial. (*Int. Rev. Act 1864*, § 163.)

Neither was the memorandum inoperative as a defeasance because executed with a third party; because it contained two parts, one defining the object and purpose of the assignment, the other covenanting to indemnify against

Parks v. Comstock.

costs, and Wilson was only a surety for the performance of the covenant of indemnity.

It must be conceded that the memorandum is indefinite and uncertain in some particulars; but the intent that it should operate as a defeasance of the absolute terms of the assignment is too clearly expressed to admit of any doubt.

Construing the two instruments together, it shows the condition, purpose and intent of the parties and the effect of the transaction to be this: Parks and Buchanan were copartners under the firm name of S. A. Parks & Co. Such firm held, subject to liens, the title to 198 shares of the stock of a corporation known as the Pioneer Paper Company, in which Comstock and Wilson were also stockholders; some difficulty had arisen between Parks and Buchanan, whereby Parks desired a dissolution and an adjustment of the firm matters; he had a consultation with Comstock, and to accomplish such desire assigned to Comstock his interest in the stock of said company, with an agreement that Comstock should take legal measures to effect a settlement of the said partnership and ascertain the value of Parks' interest in said stock. As a formal consideration for such assignment, and to continue Parks as stockholder and director of said company, Comstock transferred to Parks ten shares of other stock owned by him, with the agreement that pending the settlement with Buchanan, each should draw the dividends of said stock as though no assignment had been made; and then providing for the disposition of the stock, its amount being ascertained, as follows: If it exceeded \$1000 over and above the costs and expenses of its ascertainment, the surplus to remain for future disposal. If the interest was not enough to cover \$1000 and costs, but still enough to pay costs, the said costs to be paid, and the balance to be assigned to Parks, he to reassign to Comstock the said ten shares. If Parks had no interest in said stock, then

Parks v. Comstock.

he was to reassign the said ten shares of stock to Comstock, and Comstock to pay all costs and expenses. In part, this agreement is very clear, and in part uncertain. It is clear that litigation and expense was contemplated as necessary to obtain an adjustment or determination of Parks' interest in the 198 shares of said stock; that if nothing was realized, the entire cost and expense of such litigation should be borne by Comstock; if anything was realized and enough to pay such cost and expense, it should first be appropriated for that purpose; if any amount over such costs were realized, that after paying such costs, it should be appropriated to Comstock to the extent of \$1000, to reimburse him for the ten shares of stock assigned to Parks; that the overplus, if any, after paying such costs and reimbursing the \$1000, was to remain for future disposal.

So far there seems no difficulty; but it is exceedingly difficult, satisfactorily to determine what is to be done with that surplus set apart for future disposal. It must be determined from the two instruments and from such other facts connected with the transaction as were proved on the trial. Parks claimed an equal undivided interest in 198 shares of stock valued at about \$10,000. Comstock without any interest takes an assignment of that interest to litigate it, at his own cost and expense, if unsuccessful. It is highly improbable that Parks intended to give away all his interest in the 198 shares claimed to be worth \$10,000, thus confirming the theory of a defeasance; and the instrument of defeasance canceled, it seems improbable that Comstock would have undertaken such a prosecution at its own risk, unless that obligation was coupled with an interest, if successful. Therefore, the fair construction of the defeasance is, that if any overplus remained from the interest in the 198 shares after defraying the litigation and reimbursing Comstock for the ten shares of stock assigned to Parks, it was in some manner to be

Parks v. Comstock.

divided between them, but in what proportion is uncertain, and perhaps not necessary to a determination of this suit.

The assignment was a valid transfer to Comstock of Parks' interest in the 198 shares of stock; the defeasance showed it was transferred to enable Comstock to ascertain the extent of that interest, and when ascertained, if of any value, to be disposed of between them. Therefore Comstock had an interest in said stock. By the assignment he became a trustee, coupled with an interest, for whatever should be adjudged as belonging to Parks as a member of the firm of S. A. Parks & Co. As such he had the legal title, and being interested, Parks could not settle and adjust the affairs of the partnership without Comstock's assent. Besides, Comstock as the legal owner had a right to manage the claim; it was so contemplated. He did commence an action, and a very proper one, too, in my judgment, to remove obstructions in the way of an action to ascertain the interests of the several members of the firm, and that action is still pending and undetermined. Before this an action was commenced against Comstock, by Buchanan, to settle the partnership matters of S. A. Parks & Co., which action is still pending and undetermined; and in that action, by an affirmative defense, all the equities between the members of the firm of S. A. Parks & Co. can be adjusted so as to determine the interest of each in the said 198 shares of stock. There is therefore no evidence of any delay or violation of agreement by the defendant. For aught that appears, he is endeavoring by proper means to ascertain the interest of Parks in the 198 shares of stock; and until a determination is had, or an amicable settlement or adjustment made by those interested therein, and authorized to act, the extent of that interest cannot be known, the rights of the parties determined or the equities between them adjusted.

Parks v. Comstock.

Therefore this suit cannot be maintained.

1st. Because there is no such fraud established as would justify setting aside the assignment, or declaring it void.

2d. Because the defendant having assumed responsibility, incurred costs and performed services, has such an interest that the plaintiff cannot revoke the assignment, settle the copartnership matters, and determine the interest he had as such partner in the 198 shares of stock, without the assent of the defendant.

3d. Because if the defendant had no interest even, and if the power of revocation did exist, actions having been commenced by and against Comstock in relation to the matter, the plaintiff could not revoke the assignment, without, in addition to the offers made, tendering an indemnity against such actions, for all costs and damages.

The complaint was, therefore, properly dismissed, and the judgment should be affirmed.

Such judgment will not prevent another action for the same matter, if a different case can be presented and made out by proof.(a)

[ST. LAWRENCE GENERAL TERM, October 8, 1865. *Bookee, James and Rosekrans*, Justices.]

(a) The above decision was subsequently affirmed by the Court of Appeals, when the following opinion was delivered by GRAY, commissioner.

GRAY, Commissioner. The obvious theory upon which the plaintiff commenced and prosecuted this action was that the agreement of the 17th of June, 1863, signed by himself, the defendant and Wilson, was, as to the plaintiff, fraudulent and void upon the alleged ground that it was imposed upon him by the fraud of the defendant in procuring it to be so written as not to express the actual agreement as made between them. The statement made by the plaintiff on the 19th of February, 1864, that the agreement, as written, did not express their agreement as it was in fact made, and for the purpose of rescinding it, offering to pay the costs of the suit brought by the defendant against Buchanan up to that time, and reassign the ten shares of stock assigned to him by the defendant, was not an act in affirmance of the contract, but an effort to rescind it by compromise; but when he rested his case after simply introducing the written contracts and this offer, without an effort to establish the alleged fraud, the referee should have dismissed his complaint; assuming

 Foot v. Webb.

that the plaintiff's offer to pay the costs of that suit up to the time of his offer, was in affirmance of the contract as written. The offer, if it was worthy of any consideration, was manifestly insufficient. Besides that suit, there was another commenced by Buchanan against both the plaintiff and defendant, in November, 1868, involving the title to the assigned stock, in which the defendant interposed an answer, and the issue made by it stood then referred. If offering to pay costs could be of any worth, the defendant's costs in the latter suit should have been provided for. Nor was the concession made at the close of the evidence, that the interest of the plaintiff in the partnership of Buchanan and himself was sufficient to cover the costs and expenses incurred in the investigation, including the costs up to the time this action was brought, of any value to the plaintiff. Property sufficient to pay costs was not in any aspect of the case what the defendant was entitled to. He was not bound to concede anything to the plaintiff until not only the ten shares of stock was reassigned, but until "after costs paid." The plaintiff's offer to prove that he had, prior to the suit of the defendant against Buchanan, settled with Buchanan their partnership affairs, was quite immaterial. The settlement, if it could be made without the sanction of the defendant, would still leave him exposed to the costs arising out of the suit brought by Buchanan against him and the plaintiff. The judgment should be affirmed.

Judgment affirmed.

 FOOT vs. WEBB and others.

By an agreement for the sale and purchase of real estate, the vendor covenanted to sell and convey the same as soon as the purchaser "secures the payment of the" purchase price. *Held* that the word "secures" was used in its popular signification, and that signification was not equivalent to payment in money, but implied something given and received, by means of which payment might at some future time be procured or compelled. That it implied a term of credit; but how long that credit was to be, or what security should be given, was left unprovided for.

By the same agreement, the vendor agreed to sell and convey the premises "*in consideration of the sum of \$700,*" and the agreement was signed and sealed by both parties. *Held* that this was a sufficient statement of the consideration to satisfy the statute of frauds.

The owner of a lot of land, by a written agreement, covenanted "to sell and convey all that piece or parcel of land situated on the corner of the public green, now occupied as a store," to the plaintiff, "in consideration of the sum of seven hundred dollars. To be conveyed as soon as the party of the second part [the plaintiff] secures the payment of the same." *Held* that the

Foot v. Webb.

agreement was void for uncertainty, because it did not fix the term of credit, nor the kind or nature of the security to be given for the purchase money, and there was nothing to show that any part of such agreement rested in parol.

Held, also, that in an action for a specific performance of the contract, the question to be decided was not whether a reasonable credit had already been given, and whether the purchase money was not now due and payable, but whether the contract was valid when made.

Although it is matter of discretion whether specific performance will in any case be granted, yet the discretion must be exercised according to certain well established rules, and does not rest in the mere caprice of the judge.

The case of *Wright v. Weeks*, (25 N. Y. 153,) distinguished from the present.

ACTION to enforce the specific performance of a contract for the sale of real estate.

On the first day of April, 1854, at Vernon Centre, Oneida county, N. Y., John Pilcher and the plaintiff, entered into a written contract under seal, for the sale and purchase of certain real estate, which was as follows:

"Vernon Centre, Oneida county, N. Y., April 1, 1854, witnesseth. I, John Pilcher, of the first part, doth agree to sell and convey all that piece or parcel of land situated on the corner of the public green, now occupied as a store, to E. M. Foot, of the second part, in consideration of the sum of seven hundred dollars. To be conveyed as soon as the party of the second part secures the payment of the same, as witness our hands and seals as above dated.

JOHN PILCHER, [L. S.]

Signed in the presence of

E. M. Foot, [L. S.]

JOSIAH S. FOOT."

Under this contract, the plaintiff at once took possession of the premises in question, claiming ownership under the contract, and continued to occupy them down to the commencement of this action; and from the making of the contract to the death of the said John Pilcher, he paid him the annual interest on the purchase money. Pilcher died, intestate, August 29, 1862, and the defendants are

Foot v. Webb.

his heirs at law; all of whom are non-residents, and some of whom are infants; and this action was brought to enforce against them the specific performance of the above contract. The answer set up a general denial of the complaint, and also some special matters of defense not necessary to be stated.

The action was referred to a referee. At the trial before him, and before any evidence had been taken, the defendant moved to dismiss the complaint, on the ground that the contract in question was void under the statute of frauds, for two reasons: 1st. For indefiniteness and uncertainty in the description and location of the premises; and, 2d. That it did not sufficiently express the consideration, within the meaning of the statute.

The precise objection made under the second head was, that the word *secure* was indefinite in its meaning, and required a reference to something resting in parol, and thereby the whole contract was rendered void. The plaintiff insisted, 1st. That the contract was valid under the statute, as a written contract. 2d. That possession having accompanied the contract, the whole transaction was valid as a parol contract; and the facts sufficiently appearing, the action should be sustained, under the complaint as it stood. 3d. That if any amendment was necessary, it was merely formal, as the substance of the action remained the same; and the referee, either before or after the evidence was taken, could and should allow such an amendment as would conform the pleadings to the proofs. 4th. That if the referee had not power to do that, then an adjournment should be granted, so that the plaintiff might make an application to the court, at special term, for relief.

The referee held that the description of the premises was sufficient, but decided all the other points in favor of the defendants, and dismissed the complaint. In other words, that the word *secure* had a meaning so indefinite in itself, that its use vitiated a contract otherwise valid.

Foot v. Webb.

The counsel for the plaintiff then asked for leave to amend the complaint, and to set up a parol contract, in place of the written contract, which parol contract would be a good cause for action, taken in connection with the fact that the plaintiff had been in possession of the premises in question, under the contract, ever since the same was made. To the making of such amendment the defendants' counsel objected. The referee held that he had no power to grant such an amendment, and declined to do so. The counsel for the plaintiff then applied for an adjournment, in order that he might make an application to the court for leave to make the amendment proposed. To the granting of this, the defendants objected, and the referee refused to grant the motion.

From the judgment entered upon the report of the referee, the plaintiff appealed.

O. S. Williams, for the appellant.

I. The decision of the referee, holding the description of the premises sufficient, was correct. The description, although brief, is sufficient to enable a person to locate the premises; at any rate there is nothing which shows such a location to be difficult, much less impossible. The premises are a store, on the corner of the public green, in Vernon Centre, Oneida county. 1. A general description of the premises to be conveyed is sufficient. (*Dart on Vendors*, 100. *Jackson v. DeLancey*, 4 *Cowen*, 427. *Rollin v. Pickett*, 2 *Hill*, 552.) 2. There is no patent ambiguity in this description; and a latent ambiguity, if any such should be found to exist, may always be explained by extrinsic evidence; and this rule applies to all written instruments. (*Chitty on Cont.* 8th Am. ed. 101. 2 *Kent's Com.* 555, 556, and note. *Fish v. Hubbard*, 21 *Wend.* 651. 1 *Burrill's Law Dic.* 65.) It may be doubted whether this question can be discussed here, inasmuch as the referee has

Foot v. Webb.

decided it for the plaintiff, and no one has appealed from his decision.

II. The written contract sufficiently expresses the consideration, under the statute of frauds. 1. Three things should be borne in mind, in giving a construction and interpretation to this instrument. (a.) That the parties evidently drew the paper themselves, and were unlearned in the use of legal terms; and although they may not have used the most appropriate, yet if their intention can be fairly gathered, from a reasonable, or even from a not unnatural construction of the terms used, it should be carried into effect. (b.) That the court, in all cases, and not the least in a case like this, should seek to carry out the intentions of parties, and sustain their contracts, rather than to overthrow them. (*Rollins v. Pickett*, 2 Hill, 552. *Hathaway v. Power*, 6 id. 453.) (c.) The main intention of the parties was a sale and purchase of the store, for \$700, payable in cash. If either of them had any idea of a more extended day of payment, they did not deem it of sufficient importance to be expressed in the contract. 2. The first sentence contains all that is material to form a perfect contract, or to meet the requirements of the statute—the parties, the premises sold, and the amount to be paid, or the consideration; a sale and purchase for \$700. Suppose the paper had closed at this point, with the signatures of the parties; its legal construction and meaning would have been, an agreement to sell, and payment to be made in cash; nothing being stated respecting the times or terms of payment, the law declares that it must be cash. (*Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 464, and many previous cases.) 3. The contract of sale and purchase, and payment, is in fact complete and closed, at this point. What follows relates merely to the time when the deed is to be delivered, which is a matter of secondary importance; and under no circumstances is it an essential part of the contract, in order to comply with the require-

Foot v. Webb.

ments of the statute of frauds. The contract would have been perfect if it had contained nothing on the subject.

4. Assuming that this last clause is important, or has been made so by being inserted, it does not invalidate the instrument as a written contract. It does not contain a word which refers to anything *dehors* the paper itself, or which indicates that the parties had any *verbal* arrangement respecting payment, which must be taken into the account in giving a reasonable and legal construction to the paper. 5. The broad and primary meaning of the verb *to secure* is *to make secure*, or *to make sure*. (2 *Bur. L. Dic.* 919;) and to make a payment secure, or sure, is fully answered by payment in cash. The point is, that the vendor shall have his pay; and on that, he is made secure or sure by receiving his money. The term, also, has many secondary meanings; as *to provide for*; *to obtain*; *to make*. It has acquired by usage, in some cases, a third, but more narrow and technical meaning—to give a bond and mortgage. But in the present case there is no evidence of any usage, or that the parties referred to any; and even if that were presumed to be their meaning, a bond and mortgage *due* would answer the conditions.

6. It is quite likely that the parties themselves never, in definite words, agreed upon the meaning of the terms used; they employed an expression in common use, which answered their purpose, and they left it to the law, if necessary, to fix its meaning, as they did also the meaning of the words *agree*, *sell* and *convey*. The court may give to the term any one of the meanings above mentioned, and it will sustain the contract; but it is not equity or good sense to say that it has no meaning, and must be helped out by something external, and thereby the contract be rendered void. 7. The contract is complete and valid without the last sentence; and the addition of this does not render it any less perfect. It is not possible that

• a word which has been in common and legal use for so

Foot v. Webb.

long a time, has not yet aquired a meaning of its own and standing by itself. Neither is it possible that that meaning is so uncertain and indefinite that the word is not only of no service of itself, but that its use will vitiate a contract which, but for its presence, would be good and valid in law. The principal authority which will probably be cited to sustain the decision of the referee is the case of *Wright v. Weeks*, (25 N. Y. 153,) but there is an important and controlling difference in the facts in the two cases; and the rule of law laid down in the case cited can be fully sustained without declaring void the contract now before the court.

III. But if this contract is void as a written contract, under the statute of frauds, its place is at once supplied by a *parol contract accompanied by possession*—the same in substance with the written one—a contract which is valid and can be enforced at law. Possession gives the same vitality to the parol contract which a writing, perfect in itself, would have given to the written one. (*Parkhurst v. Van Cortland*, 14 John. 15. *Harris v. Knickerbacker*, 5 Wend. 638. *Haight v. Child*, 34 Barb. 187. *Willard's Eq.* 285.) Suppose the complaint had been drawn upon such a *parol contract*, and in which the word *secure* was used precisely as in the writing; can there be any doubt but that it would have been held good? Would the word *secure* render the whole contract void? And here it may be said, by way of illustrating the positions before taken respecting the written contract, that if the parol contract is not made void by the use of this word, neither is the written one; for no greater definiteness of meaning is demanded in one than in the other. And if it should be held that the word *secure* indicates further conditions, and calls for something to be added to give it a sufficient meaning, then that *something* may be added to the complaint, and established by the evidence. And that evidence may be entirely by parol, or it may be contained in part in the

writing, and the remainder in such parol evidence as the use of the word *secure* shall be held to indicate and require. (14 *John*. 15, 31.)

IV. The parol contract being identical with the written one, except the additional fact of possession, might have been proved under the complaint as it stood, for it contained all the facts essential to such a case.

V. Even if an amendment was necessary, it was merely a formal one, and would not introduce any new cause of action. Such an amendment the referee had full power to grant, and should have granted, either before the testimony was taken, or after it was closed, in order to conform the pleadings to the proofs. (*Voorhies' Code*, § 272. *Id.* §§ 169–173.) The amendment proposed did not contemplate a new or a different cause of action; it was the same cause of action, in substance, and the plaintiff merely proposed to change, not even its form, but only the proof by which it was to be established. The application, therefore, was not liable to the objection raised in *Union Bank v. Mott*, (10 *Abb.* 372,) and *Woodruff v. Hursen*, (32 *Barb.* 558.) It is true that this matter of amendments rests, for the most part, in the discretion of the court or referee, and therefore is not the subject of appeal. But the present case is one of the exceptions to that rule; for the referee refused to allow the amendment on the distinct ground that he had *no power to grant it*; and a decision based upon that ground is the subject of appeal. (*Beach v. Chamberlain*, 3 *Wend.* 366. *McElwain v. Corning*, 12 *Abb.* 20. *Russell v. Conn.*, 20 *N. Y.* 81.) And the court at general term will order an amendment which is deemed proper, and without any formal notice of motion. (*Clark v. Dales*, 20 *Barb.* 42–67.)

VI. If the referee had not the power to grant this amendment, as he declared at the hearing, then he should have granted the application for an adjournment, so that the plaintiff might make the proper motion to the court

Foot v. Webb.

for relief. This is a proper course to adopt, in such a case; it is a course often adopted, and the refusal of the referee to grant this application was an error which should be corrected by this court. (*Forbes v. Frary*, 2 *John. Cas.* 224. *Graham's Pr.* 573.) Unless this remedy exists, the plaintiff having a good cause of action, beyond a question, though informally stated, would be turned out of court, with the penalty of a bill of costs added to his other bad fortune.

S. B. Griswold, for the respondents.

- I. The contract set forth in the complaint is invalid upon its face, and cannot be made the subject of specific performance.
 1. It is void for vagueness, uncertainty and indefiniteness in the description and location of the premises. (*Mead v. Lawson*, 1 *How. Ap. Cas.* 394. *Abeel v. Radcliff*, 13 *John.* 296. *Rollin v. Pickett*, 2 *Hill*, 552. *Jackson v. Parkhurst*, 4 *Wend.* 369. *Hammer v. McEl-downey*, 46 *Penn.* 334. *Capps v. Holt*, 5 *Jones' Eq.* 77. *Mallory v. Mallory*, *Busbee's Eq.* 80, 254, 65. *Allen v. Chambers*, 4 *Iredell's Eq.* 125. 1 *Story's Eq. Jur.* § 767. 2 *R. S.* 135, § 8.)
 2. The description in this contract would not be sufficient, either in a will, (*Miller v. Travers*, 8 *Bing.* 244; 2 *Phil. Ev. 4th Am. ed.* 763,) and the rule is less strict in regard to wills, (*Hall v. Leonard*, 1 *Pick.* 31,) or in a deed, (*Jackson v. Parkhurst*, *supra*; *Worthington v. Hylyer*, 4 *Mass.* 205; *Huntt v. Gist*, 2 *Har. & John.* 498,) or in an award. (*Schuyler v. Van Der Veer*, 2 *Caines*, 235. *Brown v. Hankerson*, 3 *Cowen*, 70. *Watson on Arb. and Award*, 166.)
 3. This contract does not give the residence of the parties, nor does it show in what town, county or state the premises are located; no boundaries are given; it does not refer to the premises as belonging to or owned by the vendor, (nor does the complaint aver ownership in the vendor;) it does not state in whose occupation the premises were at the date of the contract;

Foot v. Webb.

nor does it refer to anything *extrinsic*, by which the particular premises can be ascertained or located. 4. The words "Vernon Center, Oneida county, N. Y." which immediately precede the date of the contract, can only be used to show the location of the parties at the time the contract was made. They have no reference to the subject matter of the contract, either by their terms, or by any known rule of legal construction. (*Fisher v. Evans*, 5 *Binney*, 541. *Taylor v. Snyder*, 3 *Denio*, 145.) 5. In the following cases, the contracts were far more specific and certain, in description and location, than the one in suit. In each case the locality of the premises was certain by the terms of the contract itself, or by a reference to something *extrinsic*, by which the particular premises might be ascertained and identified. (*Richards v. Edick*, 17 *Barb.* 260. *Talman v. Franklin*, 4 *Kern.* 584. *Seaman v. Hogeboom*, 21 *Barb.* 398. *Fish v. Hubbard*, 21 *Wend.* 651. *Atwood v. Cobb*, 16 *Pick.* 227.) 6. It is evident that from the terms of the contract itself, the locality of the premises cannot be ascertained; nor does the contract refer to anything *extrinsic* by which the particular premises can be ascertained and identified. And it is further claimed that this case does not fall within the class of cases where *extrinsic* evidence is admitted, to identify and point out the precise premises agreed to be conveyed, or to fit the description to the thing conveyed. The ambiguity here is one that the law will not allow to be removed by parol evidence. (*Miller v. Travers*, 8 *Bing.* 441. 2 *Phil. Ev.* 719, 726, 763. 2 *Pars. on Cont.* 563, and cases *supra*. *Wigram on Extrin. Ev.* 105, 117, 2d ed.) 7. The great difficulty is, that the contract does not point out in what part of the earth the premises are located; it refers to nothing *extrinsic* by which the public green can be ascertained and located. If it be interpreted to read: "Situated on the corner of the public green in Vernon Centre, Oneida county, N. Y.," or parol evidence be admitted, to show that the premises the

Foot v. Webb.

vendor intended to convey were in fact located there, you thereby introduce *new words*, and a *new description* into the body of the contract itself, within the rule laid down in *Miller v. Travers*; and all the authorities go to show that this cannot be done, even in case of a will or deed. 8. It is said that a greater degree of certainty is required in a contract, when specific performance is asked for, than in an action at law for damages for a breach of its conditions. And the court will observe that the class of cases in which contracts have been upheld when the description of the subject matter was imperfectly given, were actions at law, for damages growing out of a breach of some covenant therein. (*Fry on Specific Perf.* § 229.)

II. The referee was correct in holding the contract set forth in the complaint as void, for not sufficiently expressing the consideration, under the statute of frauds. 1. It should have stated how the purchase money was to be secured. The contract evidently contemplates a period of credit to be given to the vendee, and therefore should state the species of security, the period of credit to be given, and the time and manner of ultimate payment. (*See 3 R. S. 220, § 8, 5th ed.; Wright v. Weeks, 25 N. Y. 153; Abeel v. Radcliff, 13 John. 296; 1 Story's Eq. Jur. § 767.*) 2. The statute of frauds declares that a certain class of contracts, of which this is one, shall be void unless it, or some note or memorandum thereof, *expressing the consideration*, be in writing, and be subscribed by the vendor of the land, or his lawfully authorized agent. This statute requires that not only shall the fact that the contract was made, be evidenced by writing, but that the contract itself, *with all its terms and conditions*, shall be in writing. (*Per Allen, J., in Wright v. Weeks, supra.*) 3. The last clause of the contract, which reads "to be conveyed as soon as the party of the second part *secures the payment of the same*," presents an ambiguity that is patent, and cannot be explained by parol evidence, within well settled

Foot v. Webb.

rules of law. The word *secures* has great importance, and is significant, in this branch of the contract. It cannot be rejected; full effect must be given to its meaning; or, as Judge ALLEN remarks, at the close of his opinion in *Wright v. Weeks*, "The words cannot be rejected. They are a part of the memorandum made by the parties, and effect must be given to them; and giving effect to them leaves the contract ambiguous, and therefore void." 4. The definition of the word "*secure*," according to *Webster*, is, "To make certain." "To put beyond hazard." "To make certain of payment;" "as to *secure* a debt by mortgage." And *Blackstone* defines the word *security* to mean "Anything given or deposited to secure the payment of a debt, or the performance of a contract, as a bond with a surety, a mortgage, the indorsement of a responsible person, a pledge, &c." The word *secures*, in the sense in which it is used in the contract, means, and was intended to mean, "*to make certain of payment*." This last phrase of the contract can have but one rational signification, and that is derived from the natural import of the words themselves. 5. It was contended by the plaintiff, on the trial before the referee, that a cash payment would satisfy the terms of this contract; that by paying over the purchase money in cash, the plaintiff would thereby *secure the payment* of the same, within the meaning of the contract. Such a doctrine is simply absurd. To *pay* a sum of money, and to *secure* the payment of a sum of money, are two separate and distinct acts. 6. A cash payment will not satisfy the terms of this contract; the contract does not call for that. 7. It is easy to see how the matter of credit to be given might have constituted a material portion of the consideration to both parties. To the vendor it may have been an object to keep the purchase money invested; it prevented the vendee from coming forward at any time, without notice, and thrusting the money into the hands of the vendor, at a time, perhaps, when it would

Foot v. Webb.

be difficult for him to invest it. As to the purchaser, it enabled him to come forward with a security, and demand a conveyance, at a time when, perhaps, it would have been difficult for him to raise the cash for the payment. 8. Nor could the plaintiff waive the credit, and treat the purchase money as payable at once. (*Davis v. Shields*, 26 Wend. 341, explained by *Denio, J.*, 25 N. Y. 158.) 9. The last clause of the contract shows, beyond a doubt, that a term of credit was to be given to the purchaser; a security for the payment of the purchase money to be given, instead of a cash payment, whenever a conveyance was demanded. 10. But the difficulty is, the parties have not made a perfect memorandum of the contract, as required by the statute of frauds. They have not gone far enough; they have left matters vague and indefinite; there were terms and conditions which they did not reduce to writing. They should have written out, in the contract, a description of the security, the period of credit, and the time and manner of ultimate payment. 11. The terms of payment, and time or times within which the purchase money is to be paid, in a contract for the sale of land, is a part of the consideration, and must be fully expressed in the contract itself. (See *Wright v. Weeks*, 25 N. Y. 155, 157, 161.) The familiar rule, so often applied in the case of promissory notes, contracts for the sale of goods, &c., that where no terms of payment are mentioned in the contract, the law implies that it means "payable on demand," or "payable on delivery," is not applicable to contracts for the sale of land, where, by statute, the consideration must be fully expressed in the writing itself. The law will not, by implication, cure a defect in a contract by implying terms and conditions, where, by statute, the contract itself must, in express terms, contain all the material terms and conditions of the agreement. This proposition is fully established by the case of *Wright v. Weeks*, (*supra*.) 12. The court, in looking at contracts under the statute of frauds,

will interpret the language in its ordinary use and meaning, and according to the general understanding. The intention of the parties, as declared by the words of the instrument, must govern the construction, even though the effect would be to invalidate the instrument within the statute of frauds. (*Statton v. Pettit*, 3 *Eng. Law and Eq.* 479. 2 *Para. on Cont.* 501, note 504.) The language here is clear, unequivocal and unambiguous; therefore the court will interpret it in its ordinary use and meaning. (*Springsteen v. Samson*, 32 *N. Y.* 703, 706.) 13. The action for specific performance is always addressed to the sound discretion of the court, and the court will not struggle to uphold the contract, in a case like this, where a great lapse of time has occurred, and circumstances have happened that would render it grossly inequitable to decree a specific performance, conceding the contract to be valid. 14. The principle of the maxim, "*ut res magis valeat quam pereat*," so often applied in the case of a will or deed, will not be so strenuously adopted in the case of a contract for the sale of land. Upon this principle it is said in *Fish v. Hubbard*, (21 *Wend.* 654,) that it is the duty of the court to make a deed or will effective, if possible. This rule applies more particularly to cases of the construction of written instruments, where words have several technical senses. There the court will adopt the sense which will give effect to the contract. But even here, the words must bear the sense which, by construction, is put upon them. (*Gibson v. Minet*, 1 *H. Black.* 614.) 15. We ask the court to hold, with the referee in this case, as the Court of Appeals held with regard to the contract, in *Wright v. Weeks*, "that the plaintiff cannot maintain this suit, except upon the footing of a contract, by which time was to be given for the payment of the price of the land;" and the contract, not setting forth the period of credit and the terms of payment, is *void*, as not fully expressing the consideration, within the statute of frauds.

Foot v. Webb.

The ruling of the referee, upon the validity of this contract was manifestly correct.

III. The exception to the refusal of the referee to grant the amendment asked for, was not well taken. The referee was clearly right in refusing to grant the amendment, on the ground of a want of power in him to allow such an amendment, on the trial. (*Code*, §§ 272, 169-173. *Union Bank v. Mott*, 18 *How. Pr.* 506; 19 *id.* 267. *Woodruff v. Hurson*, 32 *Barb.* 557. *Everett v. Vandryes*, 19 *N. Y.* 439. *Catlin v. Hansen*, 1 *Duer*, 327. *Fagen v. Davidson*, 2 *id.* 153. *Billings v. Baker*, 6 *Abb.* 213.)

IV. The adjournment asked for by the plaintiff was a matter purely discretionary with the referee, and the decision is not appealable. Nor will this court review the same, on an appeal from the judgment.

By the Court, MULLIN, J. By the agreement sought to be specifically enforced in this case, the intestate covenanted to sell and convey the premises therein referred to, "*as soon as the party of the second part* (the plaintiff in this suit) secures the payment of the same;" that is, the purchase price. The word "secures" was used in its popular signification, and that signification is not equivalent to payment in money, but implies something given and received, by means of which payment may at some future time be procured or compelled. It implies a term of credit. How long that credit was to be, or what security should be given, is left wholly unprovided for by this writing.

This case is distinguishable from that of *Wright v. Weeks*, (25 *N. Y.* 153.) In that case the agreement was to sell, within three months, the premises described, for \$6500, *upon the terms as specified*. The Court of Appeals held that the writing was incomplete without the terms referred to, and as those terms rested in parol, the contract was void within the statute of frauds; that by that statute the whole contract must be in writing, and cannot rest partly

Foot v. Webb.

in writing and partly in parol. In the case before us there is nothing to show that any part of the agreement rests in parol, and hence if the agreement is defective it is so because the parties have failed to agree upon the terms of credit, or the kind of security to be given.

The defendant's counsel insists that the consideration of the agreement is not stated, and it is for that reason within the statute of frauds and void. In this, I think he is mistaken. A consideration is stated in the most explicit terms. The language is, the party of the first part agrees to sell and convey "*in consideration of the sum of \$700,*" and the agreement is signed and sealed by the plaintiff. If this is not a sufficient statement of the consideration to satisfy the statute, it would be difficult to find language which would be more expressive. I am entirely satisfied that the contract is not avoided by the statute of frauds. But although the contract may not be invalid by reason of the statute of frauds, the question to be next considered is whether it is void because of uncertainty as to its terms. In *Chitty on Contracts*, 73, it is said: "But in order to constitute a valid parol or written agreement, the parties must express themselves in such terms that it can be ascertained to a moral or reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties." Courts of equity refuse to compel the performance of either a verbal or written agreement unless established by competent proofs to be clear, definite and unequivocal in all its terms. If the terms are uncertain, or ambiguous, or not made out by satisfactory proofs, a specific performance will not be decreed. (2 *Story's Eq. Jur.* §§ 764, 767, 751.)

It is inferable from the language used in reference to the degree of certainty required by courts of equity in

Foot v. Webb.

order to induce them to compel specific performance of a contract, that a greater degree of certainty is required than is necessary to render valid a contract in the courts of law. But I do not think that any such distinction was intended. The rules of construction of contracts are the same in both courts; and no reason can be assigned for demanding a greater degree of certainty in the one court than in the other. It is true, it is matter of discretion whether specific performance will, in any case, be granted; yet I apprehend the discretion must be exercised according to certain well established rules, and does not rest in the mere caprice of the judge. The question then is, is the contract under consideration void for uncertainty because it does not fix the term of credit, nor the kind or nature of the security to be given for the purchase money? It is said in *2 Parsons on Contracts*, 47, that when anything is to be done, as goods to be delivered, or the like, and no term is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time. But what is a reasonable time is a question of law for the court. This rule applies to the time within which the security was to be given. The defendant bound himself to convey "as soon as the party of the second part secures the payment," &c.

It was held by the Supreme Court of Pennsylvania, in *Guier v. Page*, (4 *Serg. & Rawle*, 1,) that a sale for approved indorsed paper means, in law, a sale for paper which ought to be approved, and not for paper such as the seller may approve. It was held in *Winslow v. Copeland*, 3 *Shepley*, 276,) that when payment for land is to be made by good notes secured by mortgage on the premises, the notes must be good without the mortgage, and the mortgage is to be additional security. These cases have gone the farthest in supplying apparent omissions in contracts, and in giving effect to the intention of the parties, yet these do not go far enough to enable the court to fix the term of

Foot v. Webb.

credit which the plaintiff should have for the payment of the purchase money, nor the kind of security which he ought to have given. I think the contract is void for uncertainty in these respects.

If the question was, whether a reasonable credit had not already been given, and whether the purchase money was not now due and payable, I should answer both questions in the affirmative. But we are to decide whether the contract was valid when made; as, if it was not then valid, it is not now, unless it has been made valid by the receipt of the interest by the intestate from year to year, up to the time of his death. But I do not see how that remedies the defects in the agreement. It does not fix a term of credit, nor prescribe the kind of security which should be given.

If these views are correct, it follows that no amendment of the complaint could aid the plaintiff. The written agreement being void, a verbal one couched in the same language must be also void by reason of the same defects. It is not alleged that there was a verbal agreement containing provisions as to the time of credit, or the nature of the security to be given, and without this it would be folly to allow the commencement of an action which must be defeated on precisely the same ground as the present one. No question is made as to whether the contract was void for want of mutuality, but I apprehend that no advantage could be taken of that defect if there was a want of mutuality. (*See Worrall v. Munn*, 1 *Seld.* 229, and cases cited on page 246.)

The judgment must be affirmed, with costs.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 8, 1866. *Bacon, Foster and Mullin*, Justices.]

PIERCE vs. KINNEY.

Where a stream running across the defendant's land, and thence upon the plaintiff's land, below, during a flood broke through its bank, making an opening sufficient to carry all the water ordinarily running, and through this new channel the water would have continued to run, if not prevented; *Held* that the defendant had a right, for his own protection, to erect a barrier or levee across the crevasse or new channel, for the purpose of confining the waters within their original channel; provided he did not build such barrier too high, nor project it into the stream, so as to prevent the water running in its accustomed channel and with its usual force.

Held, also, that the defendant was not bound to keep the original channel of the creek open upon his own lands, as a condition to his right to maintain such barrier. And that he was not liable to the plaintiff for any damages that might ensue from a failure to do so.

THE parties own farms adjoining each other, the plaintiff's being on the north of the defendant's. A stream of water runs from the plaintiff's farm on the defendant's, and after running east on the defendant's farm nearly parallel to, and only a short distance from the division line between them, turns northwardly, and again runs on the plaintiff's land a short distance before emptying in the river. During a flood, in 1863, the stream broke through its south bank, making an opening sufficient to carry all the water ordinarily running, and through this new channel the water would thereafter have continued to run had not the defendant, in July, 1863, erected a barrier or levee across this crevasse or new channel, by which the water was forced back into its original channel. At this time the plaintiff's farm was owned by one Bennett, who sold it to the plaintiff in 1865. From 1863 to 1865 the water continued to flow in its natural channel, without special cause of complaint from Bennett. But in 1865, during another flood, dirt and gravel were brought down from the plaintiff's land by the stream, and deposited in the bed of the stream, some few rods below where this barrier was erected, to such an extent as to fill the bed of the stream, and crowd the water out of such channel to the north,

Pierce v. Kinney.

when it leached over lands of the plaintiff, and seriously injured their value. The plaintiff now brings his action to recover the damage done to his lands, and alleges, as the substantial wrong done by the defendant, the erection of the barrier or levee across the crevasse, in 1863. Upon the trial of the cause the plaintiff requested the judge to charge the jury "that after the flood of 1863, if the defendant would restore the south bank to its original height as a protection to his own land on the south, he was under obligation to restore the channel at the same time to its original condition," i. e., to remove any sand or gravel bar that may have been formed below there upon the defendant's lands by which the water was thrown upon the plaintiff's land. To the refusal so to charge the plaintiff excepted. The jury found a verdict for the defendant, and the case and exceptions were ordered to be heard in this court.

A. P. Smith, for the plaintiff.

C. B. Sedgwick, for the defendant.

By the Court, BOARDMAN, J. It is well to understand that the jury, by their verdict, have established certain facts which this court will not undertake to review. It must be taken as true that the defendant, in building the barrier against the crevasse, erected it on the same line, and of no more than an equal height with the original bank of the creek; that by such barrier the creek was restored to its original channel at that point. This, the jury were charged, the defendant had a right to do, and no exception is taken to that portion of the charge. In finding for the defendant they must necessarily have found those facts. One other fact in the case appears to have been overlooked in their points. It is this. After the building of the barrier, the water followed its old channel till it

Pierce v. Kinney.

reached the plaintiff's land, for a year and a half before gravel beds were formed of sufficient depth to fill up such original channel and thereby throw the water to the north upon the plaintiff's land, to his serious damage. The gravel bed that causes the damage in question was not there in 1863, but was chiefly produced by a flood in 1865. These facts being understood, it becomes simply a question whether the defendant is bound to keep the channel of the creek open upon his own lands as a condition to his right to maintain the barrier which he has erected for self protection. If he fails to do so, is he liable to the plaintiff for the damages that ensue. Such is the proposition presented by the exceptions.

It was and is conceded that the defendant had a right to erect the barrier across the new channel made by the flood, and thus protect his orchard and farm from serious injury. The defendant claims such right unconditionally. The plaintiff, on the other hand, insists that such right cannot be exercised without at the same time opening, and thereafter keeping open, the original bed of the creek, so far as it runs on his own land, and delivering the water to the plaintiff at his boundary, in its ordinary and accustomed channel.

I find no sanction for the claim thus set up by the plaintiff. *Angell, on Water Courses*, (§ 333,) says: "A riparian proprietor may in fact legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered;" citing *Rex v. Trafford*, (1 B. & Adol. 874, and 8 Bing. 204;) *Farquharsen v. Farquharsen*, (3 Bligh Parl. R., N. S., 421, 422.) But, says *Angell*, (§ 334,) he "has no right to build anything which, in times of ordinary flood, will throw the waters on the grounds of another proprietor, so as to overflow and injure them. * * * *Erskine* * * * says: 'When a river threatens an alteration of its present channel, to the dam-

Pierce v. Kinney.

age of the adjacent proprietor, it is lawful for him to build a bulwark, *ripx muniendæ causa*, to prevent the loss of ground that is threatened; so that a proprietor whose grounds are threatened to be washed away, may, for the purpose of protecting his own property, * * raise a bank for his own security; but this bulwark must be so erected as to prejudice neither the navigation nor the grounds on the opposite side of the river.'"

The owner of a water course may change its course on his own land, if he does not thereby injure his neighbor. "So he may change it back to its original channel," unless others, by expenditure of money, have acquired the right to its use in the new channel. (*Wash. on Easements*, 360, citing *Woodbury v. Shut*, 17 *Verm.* 387.)

It may fairly be inferred from the authorities cited, that the defendant had the right to erect this barrier, and thus confine the waters within their original channel. Nor is there any intimation that he is responsible for any damage to his neighbor, unless it is the direct consequence of his building his barrier too high, or projecting it into the stream so as to prevent the water running in its accustomed channel and with its usual force. He has the right to repair or rebuild the broken bank—not to make a different one. If he does this, no direct injury is done to his neighbor. The injury that may arise from a gravel bed lower down the stream is not due to the interposed barrier. It arises from an obstacle created by the natural flow of the stream. Had no *crevasse* been made, the gravel bank might, and doubtless would, have been deposited by the natural action of the stream. The *crevasse* having been opened and the barrier immediately interposed, it stands as though the defendant had done nothing, and yet the gravel bank is there doing the plaintiff damage.

Where the bank was broken so as to form a new channel for the water, it was optional with the defendant to close the opening and restore the water to its original

Pierce v. Kinney.

channel, or let it pursue its new course. So if there were several openings at different places, he might close all or any of them, or he might leave them all open. If he had closed one which injured himself, and not closed one which injured the plaintiff, would an action lie for the damage? Such an action would seem to be founded on what the defendant had not done, rather than on what he had lawfully done.

Again; if a party's mill-dam is carried off by a flood which makes a gravel bar at a point below, changing the channel of the stream, may he not rebuild his dam unless he cuts away such bar and restores the water to its channel? Is he liable for the existence of the bar? Was it his act of omission or commission that put it there? On the contrary, it is evident this obstruction is the work of nature, produced by natural causes, unaffected by man's act, except remotely and accidentally. It does not furnish a cause of action. The interests to be affected, the responsibilities to be incurred and consequences involved by a contrary decision, are too momentous to be disregarded. The whole bed of the lower Mississippi is earth brought down and deposited by its waters. The lands upon its borders are protected by levees. Holland is rescued from the ocean by its dykes. Are we to say that these dykes and levees may not be defended against destruction, lest by so doing they shall break away somewhere else? Must one man's farm be destroyed that it may be useful to drain the water from his neighbor's? Such was evidently the view of the law entertained by the plaintiff's attorney when this action was brought. There is no allusion to a gravel bank placed there by the defendant, which caused the damages, but it was "logs, stones, earth and rubbish," put by the defendant into said stream, and upon the banks thereof, opposite the land of the plaintiff, which were claimed to be the cause of the damage. It is evident the action was brought upon the theory that the barrier had

 Whedon v. Champlin.

been raised too high, or had been projected into the stream so far as to divert it from its natural course. But the jury, by their verdict, have found against any such claim. Now it is sought to sustain the action, not upon what the defendant has lawfully done, but upon the theory of negligence in not having done what by law he was required to do; and there is not a word in the complaint to indicate such a ground for sustaining the action. If the position were tenable it might be made to answer, but in my judgment both the complaint and the law must be amended before it will be adjudged that an error has been committed, furnishing a ground for a new trial.

The motion for a new trial should be denied, with costs, and judgment ordered for the defendant on the verdict.(a)

[BROOME GENERAL TERM, JANUARY 26, 1869. *Balcom, Boardman and Parker, Justices.*]

(a) This judgment was affirmed in the Court of Appeals in March 1871, but it is understood no opinion was written in the case.

 WHEDON vs. CHAMPLIN and others, Executors, &c.

A married woman, having a separate estate, may purchase a boat and carry on the business of boating, on her sole and separate account.

There is nothing in the statute which limits the kind of business which a married woman may carry on. That is a matter of taste, and not of statute regulation.

Nor is there any prohibition against her employing her husband as master or captain.

Creditors have no lien on his labor; nor is there any way by which they can force him to labor for them.

He may give his labor to a third person for his board, washing and clothing, and the creditors have no way to prevent it.

So he may give his labor to his wife, upon the same terms.

After he has acquired property by his labor, his creditors may follow it; and if he has invested it in the name of his wife, or expended it to enhance the

Whedon v. Champlin.

value of her separate property, a resulting trust may arise in their favor, to the extent of the moneys or property thus invested.

The question in all cases of this class is one of fraud; and like other kindred questions must be submitted to the jury, either when the evidence is conflicting, or when the circumstances are of such a character as to create doubt or uncertainty.

An execution against the husband was levied upon a canal boat, and his wife joined in a receipt to the sheriff. The execution was subsequently paid. Another creditor of the husband afterwards issued an execution, which was levied upon the same boat. *Held*, that the wife was not estopped from showing title to the boat, as against this second execution.

An admission by her to a third person that the boat belonged to her husband, would not be binding as an estoppel in favor of others whose conduct had not been influenced by it.

APPPEAL from a judgment of nonsuit ordered at the circuit.

The action was trespass, brought against George H. Champlin for the taking and conversion of the canal boat "Roman." After the trial Champlin died, and the suit is continued against his executors. The plaintiff claimed to own the boat by purchase from his mother, Azuba Whedon, in December, 1861. The defendants claim title through a sale on execution to W. S. Parkhurst, upon a judgment in favor of the Jefferson County Bank, against Alva Whedon, the husband of Azuba Whedon, December 3, 1861. The plaintiffs first levied upon the boat in Oneida county, on its passage with a load of grain to New York city. After it reached the city, another execution was issued to the sheriff of the city and county of New York. No direct evidence was given that the sheriff of New York made a levy on the boat while it was in the city and county of New York, but the plaintiff's proof showed that the sheriff of New York followed the boat to Brooklyn and made sale of her in Kings county.

The main question litigated upon the trial, was whether the boat was liable to execution in favor of the creditors of the husband. The plaintiff's counsel requested the

Whedon v. Champlin.

court to submit the question of fraud to the jury, but the judge held and decided, as a matter of law, that the defendant was entitled to a verdict. The grounds of the decision, with the facts necessary to understand them, are sufficiently stated in the opinion of the court.

S. Van Dusen, for the appellant.

C. W. White, for the respondent.

By the Court, MORGAN, J. The case shows that Mrs. Azuba Whedon, the wife of Alva Whedon, the judgment debtor, had separate property which she received after her marriage, to the amount of \$1000, from her father's estate, in 1853, and that she expended a portion of it for the support of her family and the purchase of furniture; that she loaned \$200 to her husband's brother, which was afterwards invested by her in a house and lot in Rome; that her husband had a contract for the house and lot, in his own name, of the value of about \$400, in 1854; that she then made an arrangement with her husband that she should pay the purchase price, \$264, and have the property in her own name; and that she actually paid, of her own money, \$200, when the deed was executed to her, leaving \$64 still owing and unpaid; that she took the conveyance in July, 1854, and claimed to own the premises ever since, and that she afterwards paid the balance; that her husband paid \$75 towards the purchase price, and expended his labor and means to improve the premises to the amount of nearly \$200; that the house was occupied by his family, and that he probably paid the taxes; that at the time of the arrangement between husband and wife, the husband was not owing debts to any considerable amount; and that the debts against him for which judgments were obtained accrued afterwards; that he failed, in 1857, and has since that time been insolvent.

Whedon v. Champlin.

It also appeared in evidence that he, as the agent of his wife, contracted to have the boat built; that he made the contract in the name of his wife; and to pay for building the boat she mortgaged the house and lot for \$800, and borrowed \$200 of her son; that the boat, furniture and horses cost over \$1500, and that the balance, or the principal part of it, was paid by her from the earnings of the boat; that her husband worked on the boat and run it as master, although she was herself on board, and that she was to allow him \$2 a day for his services.

It also appears in evidence that the boat was levied upon at Rome by an execution in favor of Nelson J. Beach, receiver &c., November 11, 1857, while it was on its way to Oswego, and that she and her husband receipted the boat to the sheriff, and afterwards settled the execution.

The judge, among other reasons for granting a nonsuit, held that this act estopped her from asserting a separate title. I doubt whether the learned judge intended to decide such a proposition. As it was one of the grounds on which the defendant's counsel rested for a nonsuit, it has found its way into the case, I think, without his attention being called to it when the case was settled; if indeed the case was ever presented to him at all for settlement. While a receipt, admitting the property to belong to the defendant in the execution, works an estoppel in favor of the sheriff as well as the plaintiff in the same execution, it has never been held, and could not be held, upon any principle applicable to estoppels, that it would thus operate in favor of another execution. The receipt in question does not admit that the property belongs to the husband, and although it might have been invoked to estop the wife from claiming the boat as against the sheriff or plaintiff in that particular execution, it would be very unjust to extend it to other parties. Mrs. Whedon had a right to buy her peace by paying up the judgment, and the receipt given by her was doubtless only

Whedon v. Champlin.

intended for that purpose. It gave her the continued possession of the boat, which at that time of year was in the way of earning a good deal of freight, and enabled her, out of these moneys, to pay up the judgment. It was not intended to be, nor should it be construed into, an acknowledgment that the boat belonged to her husband. Even an admission by her to a third person, that the boat was her husband's, would not be binding as an estoppel in favor of others whose conduct had not been influenced by it.

The principal ground for a nonsuit was that, upon the facts of the case, it appeared that the act of building the boat and obtaining means to pay for it, was not within the license of the statute permitting a married woman to carry on a trade or business on her sole and separate account; and it may also be inferred, from all that was said at the time, that the judge considered the transaction, taken all together, a fraud upon the creditors of the husband, and that the jury could not give it any other interpretation.

But I am of opinion it was competent for Mrs. Whedon to own a boat and carry on the business of boating, on her separate account. There is nothing in the statute that limits the kind of business which a married woman may carry on. That is a matter of taste, and not of statute regulation. Nor is there any prohibition against her employing her husband as master or captain. His creditors have no lien on his labor, nor is there any way by which they can force him to labor for them. He may give his labor to a third person, for his board, washing and clothing, and the creditors have no means to prevent it. Upon what theory is he prevented from giving his labor to his wife, upon the same terms? After he has acquired property by his labor, then the creditors may follow it, and if they can find that he has invested it in the name of his wife, or expended it to enhance the value of her separate property, a resulting trust may arise in

Whedon v. Champlin.

their favor to the extent of the moneys or property thus invested. The question in all this class of cases is one of fraud, and like other kindred questions must be submitted to the jury, either when the evidence is conflicting or when the circumstances are of such a character as to create any doubt and uncertainty.

In the case at bar, the wife had a separate estate, and at the time of the conveyance of the real estate to her, there is no evidence that her husband owed any debts. Considering the sums of money she had expended for the support of her family, and which he was in law bound to furnish, himself, the arrangement she testified to, as to the house and lot, was a very small return for what she had expended; and if the jury believed it was an honest and *bona fide* arrangement to settle the house and lot on her in consideration of what she had expended for him, the transaction would be valid, both at law and in equity, without the aid of the statutes of 1848, 1849 and 1860. The purchase of the boat, and the running of it on her separate account, was authorized by the law above referred to; and since the decision of the Court of Appeals in *Gage v. Dauchy*, (34 N. Y. 293,) it is clear that the boat could not be seized to satisfy the debts of the husband, unless it was shown that her title was only a colorable and fraudulent one for the purpose of protecting it from his creditors. In my opinion there is very little if any evidence of actual fraud in the transaction. But if there were circumstances tending to prove such a fraud, the question should have been submitted to the jury. For this error of the judge, the judgment should be reversed, without considering the question of the sheriff's authority to follow the property into Kings county.

All concurring, judgment reversed and new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, October 5, 1869. Bacon, Foster, Mullin and Morgan, Justices.]

TAFT vs. CARTER.

59 67
63h 516

The owner of a steamer engaged in towing boats on a lake and river is not responsible for an injury to one of the boats, while in tow of the steamer, without proof of actual negligence, or want of ordinary care and skill.

Where the navigation was dangerous, and experienced men differed as to the comparative safety of two plans proposed for making up a tow, in order to pass it safely between the piers of a bridge on the river; *Held* that the owner of the steamer towing it was not to be deemed guilty of negligence, or want of ordinary care or skill, although the jury should believe, upon the evidence, that the captain omitted to adopt the safest plan. It was at most an error of judgment.

THE appellant was the owner of the steamboat *Oswego*, engaged, in the season of 1867, in towing canal boats on the Oneida lake and river, from the head of the lake to the junction of the Oneida and Oswego rivers, at a place called "Three River Point." The respondent was the owner of a canal boat, called the *P. D. Devoe*. Captain Shaver, of the *Oswego*, took the plaintiff's boat, with others, in tow at Barnhart's Bay, on the lake, for the Oswego river. The tow was made up of boats, two abreast, and the *Oswego* towed them safely to the Oak Orchard lock, on the Oneida river, where the tow had to be broken up, in order to pass the boats through the lock. About eighty rods below the lock, a new bridge had been built, by the State, with new abutments, and the navigation there, especially at high water, was considered dangerous from the liability of the boats to swing round and strike the abutments and piers. After passing the lock, a question arose as to whether the captain should tow the coal boats through this dangerous place double or single. The captain decided to tow them through double, in the same order as before. The plaintiff expressed his opinion that it was safer to tow the boats through single. There was evidence that the captain told him to hitch on and he would risk it. The plaintiff then hauled up his boat along side of another boat, and the "tow" was fastened together

Taft v. Carter.

as before. The plaintiff, in his evidence, says: "We started, and by some means or other, I don't know how, our 'tow' got twisted a little, and in the current it was impossible to untwist it, and it (the 'tow') run down and struck the right hand pier above the bridge. That turned the tow as they were running down."

The boat that struck the pier was the one along side of the plaintiff's boat. The plaintiff had got loose from her; and then the boat attached to the plaintiff's boat behind ran into her and caused the injury. Considerable evidence was taken, on both sides, as to the comparative safety of towing boats single or double through this place. It was the usual custom to tow them through double, though exceptions had been made on some prior occasions on account of the condition of the bridge and water at that place. Accidents had occurred there, both when the boats were towed through double, and when towed through single. It was admitted that the captain of the steamboat was a competent man.

When the evidence was closed, the defendant's counsel moved for a nonsuit, and insisted that upon the whole case there was no evidence of any such gross carelessness or neglect as would make the owner of the steamboat liable. That at most it was an error of judgment. The court overruled the motion, and charged the jury that the question for them to decide was, whether or not the captain of the steamboat exercised ordinary prudence and the caution of a prudent man; and whether, knowing the place, he was not bound, as a matter of prudence, to separate these boats, which he had in tow, and whether his neglect to do so was a want of prudence. If it was a mere error of judgment, not amounting to want of skill, the defendant was not liable. Exceptions were duly taken to the charge, upon which the defendant moved for a new trial, which being denied, he now appealed from the order to the general term.

Taft v. Carter.

C. B. Sedgwick, for the appellant.

The defendant in this action is not liable as a common carrier. On the contrary, he was bound to no more than ordinary care and skill in management. (*Caton v. Rummeys*, 13 *Wend.* 387.)

The motion for a nonsuit was improperly overruled, and should have been granted. The court, in refusing the motion for a nonsuit, put it upon the ground that the defendant's servant was bound to more than ordinary care; which is error.

Misjudgment in the captain of the steamer affords no ground for supporting the verdict.

D. Pratt, for the respondent; cited *Alexander v. Greene*, (7 *Hill*, 533;) *Merrick v. Brainard*, (38 *Barb.* 574;) *Wells v. Steam Navigation Company*, (8 *N. Y.* 375; and 2 *Comstock*, 204.) He insisted that the question was purely one of fact, and that the verdict of the jury was conclusive.

By the Court, MORGAN, J. I am of opinion that the order of the special term should be reversed, and a new trial granted. The only question submitted to the jury was whether the defendant was guilty of negligence or want of skill in not taking the plaintiff's boat single instead of double through the piers of the new bridge. The evidence very strongly tends to show that the defendant exercised at least ordinary care in towing the plaintiff's boat in the situation in which it was placed; and if there was any mistake, it arose out of the circumstance that the defendant chose to attempt the passage with two boats abreast. Accidents had happened when boats were towed singly, one behind the other, but perhaps it was a fair inference from the testimony that it would have been more prudent in this instance to detach the boats. This was the opinion of the plaintiff, expressed at the time, but the captain of the steamer thought otherwise, and the plaintiff, although

Taft v. Carter.

dissenting, chose to take his place beside another boat and to be towed in this manner through the pier.

It is clear that the plaintiff was not obliged to be towed in this way. He was at liberty to decline the position assigned to him. The defendant was not a common carrier, and was not obliged to take the defendant's boat at all hazards. It was entirely a matter of contract. The defendant having performed part of it by towing the plaintiff's boat to Oak Orchard safely, the question arose as to the propriety of towing single or double through the piers of the new bridge. It is said that the captain of the steamer was guilty of negligence or want of care or skill in not adopting the plan proposed by the plaintiff. Witnesses differed as to the safety of one plan over the other. It is impossible to know with certainty which is the safest plan, although the jury had a right to find, on the evidence, that the one proposed by the plaintiff was the safest. Now it does not follow, I think, that the defendant was guilty of negligence or want of ordinary care in not adopting one plan rather than the other. It was at most an error of judgment, for which the defendant is not liable. To make the defendant liable, there should be evidence to satisfy the jury that he or his servants were guilty of something more than an error of judgment. Negligence is a relative term, but want of skill is not evidence of negligence. There was no evidence of want of skill, unless it arose out of the captain's misjudgment in a matter where experienced men differed in opinion. If the danger was apparent, and the captain of the steamer recklessly or heedlessly ran into it, it would be sufficient evidence of gross negligence to make him liable. But it would then be a question whether the plaintiff himself was not guilty of negligence in not withdrawing from the tow. But waiving this question, I think the jury were misled by the charge into the belief that it was negligence in the captain of the steamer, in not adopting what they should believe

 King v. Whaley.

to be the safest plan, in a case where men might well differ in opinion, without being guilty of negligence or want of ordinary skill.

On the whole, I think a nonsuit should have been granted, and for the error of the judge in denying it, a new trial should be granted, with costs to abide the event.

[ONONDAGA GENERAL TERM, October 5, 1869. *Bacon, Mullin and Morgan, Justices.*]

 KING vs. WHALEY and ROBINSON, impleaded, &c.

A testator devised his lands to his widow for life, with remainder to his nephew, W. S. V., his heirs and assigns forever. His widow afterwards married A. S., and W. S. V. thereupon conveyed his remainder, in trust, to F. S. for the sole use and benefit of A. S. during his natural life, in case he survived his wife; and directed in case of her sickness or inability, and more than the use of the lands should be required for her support, that F. S. might sell portions of such lands, sufficient to support and maintain her; and after her and her husband's death, the said lands, or such parts thereof as should then remain unsold, to the heirs of W. S. V. and F. S. in equal parts, one moiety thereof to the heirs of each; or in the same proportion to their children, if the parents should then be living.

Held, 1. That the trusts were valid, and the deed effectual to dispose of the estate in remainder.

2. That if A. S. survived his wife it would operate to create a valid trust in F. S. to receive the rents and profits of the lands and pay them over to A. S. during his life.

3. That the authority conferred upon F. S. to dispose of portions of the lands for the support and maintenance of the wife of A. S. in case of her need, was a *general power in trust*, and the remainder in fee, being limited upon the two lives in being of A. S. and wife, was effectually granted to the children or heirs, as the case might be, of W. S. V. and F. S., subject only to the execution of the power.

Where the ultimate remainder in fee is limited upon two lives in being at the time of the grant, it will not be defeated by the creation and failure of an intermediate trust estate.

In an equity action, the court will not reverse the judgment on account of the admission of improper evidence, if from the whole case it appears that such evidence could not have changed the result.

 King v. Whaley.

It seems where one of several owners enters into the actual possession of land under a deed which purports to convey the entire interest, it will not be presumed, without other evidence, that his possession is hostile to the remaining owners.

The declarations of the tenant, in such a case, though perhaps unnecessary, are competent evidence to restrict his claim and show that it is not adverse.

APPEAL from a judgment entered upon the report of a referee.

Certain premises were originally owned by William Vizer, who by his last will and testament, bearing date April 6, 1830, devised the same to his wife Nancy Vizer, for life, and after her death, to his nephew William S. Vizer, his heirs and assigns forever. The testator died in December, 1832. Prior to April 9, 1835, the widow married Amasa Sheldon; and on that day William S. Vizer and wife executed and delivered to Fenner Sheldon a conveyance, *in trust*, for the sole use, benefit and behoof of Amasa Sheldon, husband of Nancy Vizer, during his natural life, "in case he should survive his said wife Nancy; and in case of the sickness or inability of the said Nancy, and more than the use of the premises * * * should be required for the support of the said Nancy, then and in that case sufficient of the said premises * * * may be sold for the comfortable support and maintenance of the said Nancy; what shall be required over and above the use of the residue for her support, and after the death of the said Amasa Sheldon and Nancy his wife, the said premises or such part thereof as shall then be unsold, in equal parts to the heirs of Fenner Sheldon, party of the second part, and the heirs of William S. Vizer, party of the first part, in equal portions; that is, the one moiety thereof to the heirs of the said Fenner Sheldon, and the other moiety thereof to the heirs of the said William S. Vizer."

It was further provided, that in case either Fenner Sheldon or William S. Vizer should be living at the death of

King v. Whaley.

the said Amasa Sheldon and Nancy his wife, then the premises were to go to their children, "in the same proportion as to the heirs, were they or either of them deceased."

Upon the trial, it was shown that the testator died in 1832, and Fenner Sheldon died in 1853, leaving heirs; that Amasa Sheldon and his wife died in 1857, without having required a sale of any portion of the premises for the support of Nancy, as authorized by the deed of trust; and that William S. Vizer was living at the time of the death of Amasa Sheldon and Nancy his wife, and had three children, Joel Vizer, Lydia Vizer and William Vizer.

Joel and Lydia Vizer, by a conveyance executed in October, 1862, conveyed their interests to Albert J. Wilkinson, who was not a party to the suit, but after the report of the referee he appeared by E. L. Stevens, his attorney, and consented that a judgment might be entered upon the report of the referee, without further notice. It was suggested on the trial, that he had reconveyed his title to Joel and Lydia Vizer, but the reconveyance does not appear in the case.

The action was for a partition of the premises, and was referred to a referee, who found that Charles S. King, Ada Ann King, and May S. King were each seised in fee of one-seventh of an undivided half of said premises, and James S. Whaley of five-sevenths of an undivided half thereof; and the three children of William S. Vizer, viz., Joel, Lydia and William, or the grantees of the two former, Joel and Lydia, provided they have not been reinvested with the title, each one-third of an undivided half.

As a partition could not be made, without great prejudice to the rights of the parties, the referee directed a sale, and a judgment declaring the rights of the parties as above set forth, as far as the same had been thus ascertained, and also requiring the judgment to be suspended until the necessary parties could be brought in and given an oppor-

King v. Whaley.

tunity to set forth their rights and interests and have the same duly ascertained and declared, to the end that the whole controversy might be determined. After the appearance of William S. Vizor, Joel Vizor, Lydia Vizor and Albert J. Wilkinson, and with their consent, a judgment was duly entered, declaring the rights of the parties as follows: To the plaintiff, one-third of one-seventh of one-half; to Ada Ann King, one-third of one-seventh of one-half; to May S. King, one-third of one-seventh of one-half; to Mary Corcoran, one-seventh of one-half; to James S. Whaley, five-sevenths of one-half; to Joel Vizor, one-third of one-half; to Lydia Vizor, one-third of one-half; to William Vizor, one-third of one-half. And the judgment then proceed to direct a sale and further proceedings as is usual in cases of partition.

It appeared on the trial, that *James S. Whaley* took title to five-sevenths of one-half through *Robert W. Jones*, by deed bearing date April 1, 1864. Jones took title from Charles Stokes and William V. Sheldon, December 27, 1859, and acquired only the legal interest in five-sevenths of one-half unless he had also acquired the interest of the three Vizors, which does not appear. He went into possession after the conveyance to him.

It also appeared that William S. Vizor, by quit-claim deed bearing date July 6, 1867, for the nominal consideration of \$560, conveyed the premises to Charles Stokes, and whatever interest William S. Vizor had in the premises passed to Jones by the subsequent deed to him of December 27, 1859.

While Jones was in possession he made certain statements or admissions as to the extent of his title. The plaintiff inquired of William V. Sheldon what title Jones claimed to own. The witness answered that he never heard that he claimed to own the rights of the Kings. The witness was then asked what interest Jones paid for, and he answered

King v. Whaley.

that he did pay for that interest, but they were deducted out. An objection was taken to the evidence.

Edward L. Stevens was then sworn for the plaintiff, and testified that he talked with Jones about his title.

“Q. What rights did he claim? Objected to as inadmissible, improper, irrelevant and immaterial; no evidence of title for the plaintiff or others; not proper evidence to impeach, destroy or take away title. Objection overruled. Defendant excepted. A. He did not claim to have this right. Q. State what he claimed. Objected to as last before. Objection overruled, and the defendant excepted. A. He claimed all but the heirs of Susan and one-seventh to Stokes; Corcoran another seventh; there were two-sevenths that he did not claim to own, and had not paid for.” Other similar evidence was given, under objection and exception.

The defendants then moved for a dismissal of the complaint, upon the following grounds:

1st. The plaintiff has shown no right, title or interest in himself to the premises in question.

2d. The trust deed from William S. Vizer and wife to Fenner Sheldon, as trustee, conveyed no right, title or interest to the plaintiff or any other party.

3d. There is no evidence of any right, title or interest, jointly or as tenants in common with the defendants, and none that impeaches the defendants' rights.

4th. The fee of the premises in question was not conveyed by said trust, and was still in William S. Vizer, and by transfer to Stokes, Stokes became the owner in fee; and through Stokes the defendants Robinson and Whaley became the owners of the title of William S. Vizer.

The motion was denied, and the counsel for the defendants Robinson and Whaley duly excepted to the decision of the referee, and appealed from the judgment.

King v. Whaley.

Johnson & Prescott, for the appellants.

Pomeroy & Southworth, for the respondents.

By the Court, MORGAN, J. It appears from the case, that all proper persons have been made parties, since the report of the referee, and consent to the judgment, except the defendants Whaley and Robinson. Robinson is in possession under a parol contract of purchase, and having paid the consideration in full, is the equitable owner of whatever title Whaley acquired by his deed from Jones.

These two defendants represent the same interest; and although it does not appear that Whaley has acquired the legal title of the three Vizors, who each takes one-sixth, as children of William S. Vizor, under the trust deed, and to whom that interest is awarded by the judgment, the case shows that Whaley, while in possession, claimed to have acquired their interests; but as he makes no objection to the form of the judgment or finding of the referee in respect to these interests, and all parties seem to be satisfied with the decision of the court in respect thereto, it is unnecessary to open the litigation again, in order to discover the true state of the legal title as between these several parties who have appeared and assented to the judgment, and as to which no objection is taken by the appellants.

Assuming, therefore, that the judgment is satisfactory to all the parties except the defendants Whaley and Robinson, and that they only object to the conclusions of the referee as to the operation of the trust deed, and his decision as to the admission of evidence of the declarations of Jones while in possession of the premises, it will only be necessary to examine the questions arising out of such objections; and if the referee was right in his decision as to the validity of the trust deed, and as to the admission

King v. Whaley.

of the evidence objected to, the judgment being satisfactory in other respects, should be affirmed.

If the trust deed, so called, was invalid, the title remained in the creator of the trust, *William S. Vizor*, and by his conveyance to Stokes, and the latter's conveyance to Jones, the legal title was vested in Jones, and finally conveyed to Whaley by his deed of April 1, 1864.

When William S. Vizor executed the *trust deed*, the title was in Mrs. Sheldon for life, and the remainder in William S. Vizor, to whom it was devised by the will of William Vizor. Of course William S. Vizor had no interest in the land until the termination of the life estate; and his deed of trust was inoperative during the life of Mrs. Sheldon, except so far as it authorized a sale of the land for the support and maintenance of Mrs. Sheldon, in case she required it for that purpose. But it effectually disposed of the remainder, or what there was left of it, to the children or heirs of Fenner Sheldon and the said William S. Vizor, after the death of Amasa Sheldon and his wife. If, however, Amasa Sheldon had outlived his wife, the deed of trust vested in him a life estate beyond the life estate of Mrs. Sheldon created by the will.

If the trust deed is valid, it operated to enlarge the intermediate estate by extending it to two lives instead of one. But upon the termination of these two lives in being, the remainder became actually vested in the children or heirs, as the case might be, of William S. Vizor and Fenner Sheldon. It is clear, therefore, that the absolute power of alienation was not thereby extended beyond two lives in being.

But the husband of Nancy Vizor took no title to the lands during the life of his wife. The will of William Vizor had effectually vested the life estate in his widow, who afterwards married Amasa Sheldon. The trustee named in the trust deed (Fenner Sheldon) was however empowered to sell a portion of the land for the benefit of

King v. Whaley.

Mrs. Sheldon in case of need; and such a sale, if legal, would have defeated the title to the remainder *pro tanto*, leaving the remainder undisposed of to pass to the heirs or children of William S. Vizor and Fenner Sheldon after the termination of the life estate.

This trust, I think, was valid. In case Amasa Sheldon survived his wife, it operated to create a trust in Fenner Sheldon to receive the rents and profits of the land and pay them over to Amasa Sheldon during his life, and upon the death of Amasa Sheldon the trust would cease and the property at once vest in the children or heirs at law of William S. Vizor and Fenner Sheldon. (1 R. S. 728, § 55, p. 730, § 67.) This trust deed also contained a general power in trust in Fenner Sheldon to dispose of the land or portions of it for the benefit of Mrs. Sheldon, and the remainder in fee was limited upon the two lives of Sheldon and wife, and was effectually conveyed to the children or heirs of Fenner Sheldon and William S. Vizor, subject to the execution of the former. (1 R. S. 729, § 58.)

In fact Fenner Sheldon died in 1853, several years before the termination of the life estate of Mrs. Sheldon, who died in 1857; but whether before or after the death of her husband, does not appear, nor is it material. If he had survived his wife, the trust would not have been suffered to fail for want of a trustee. (1 R. S. 730, § 68.) The question is not affected by the order of events; nor will the estate in remainder fail because of an intermediate trust estate, which failed; as the remainder in fee was not limited upon the trust estate, but upon the termination of the two lives in being at the time of its creation. (1 R. S. 723, § 15.)

I come to the conclusion, therefore, that the referee was right in his construction of the will and the trust deed; and the only remaining question is whether the defendants' exceptions to the rulings of the referee in the admission of evidence, are well taken.

King v. Whaley.

This being an equity action, it is clear, I think, upon the authorities, that the court will not reverse the judgment, although the evidence was inadmissible, if from the whole case it appears the evidence could not have changed the result.

The evidence tended to show that Jones, the predecessor of Whaley, while in possession, claimed the whole interest except the right of the Kings and Mrs. Corcoran. This claim would exclude the interests awarded to Joel, Lydia and William Vizor, which included an undivided half of the premises, and would show an adverse possession, as against them. But no objection is taken to this part of the judgment. As to the Kings and Mary Corcoran, the evidence tended to show that Jones did not claim their interest. The presumption is, that Jones occupied in accordance with the title conveyed to him, and not adversely to the title of the Kings and Mrs. Corcoran, unless he claimed title through the deed of William S. Vizor, which was doubtless executed upon the theory that the trust deed was invalid. But as that deed conveyed no title, and it does not appear that Jones entered under it, the evidence was, I think, admissible to show that his entry was not in hostility to the title of the Kings and Mrs. Corcoran. Perhaps the evidence was entirely unnecessary, as I think the law would presume that he entered into possession under the legal title conveyed to him, and not in hostility to others who claimed an undivided interest under the same title.

It is a mistake to suppose that the evidence was given to upset or overthrow Whaley's title. He took a conveyance from Jones, and presumptively entered into possession under the legal title which was in Jones, before his conveyance. The legal title of Jones, we have already seen, did not exclude the title of the Kings and Mrs. Corcoran, nor did he claim it did. Now while it is doubtless true that one tenant in common may oust his co-tenant by an

Smiley v. Bailey.

adverse claim and possession, there is no evidence in this case of such adverse claim or possession. The referee, therefore, must have come to the same conclusion without the introduction of the evidence of Jones' declarations. The most that can be said is, that the evidence was unnecessary, and did not change the result; but as it tended merely to prove what the law would presume without it, the exception is unavailable to the defendant, and furnishes no ground for a new trial.

In my opinion the judgment should be affirmed, with costs to be paid by the appellants.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 5, 1869. *Morgan, Mullin and Bacon*, Justices.]

VELORA W. SMILEY, in his own right and as guardian for others, *vs.* HARVEY BAILEY, guardian of Richard T. Everett and others.

A testator devised to his son all his real estate during his life, and at and after the decease of his son, the same to be divided between his grandchildren, share and share alike, whether born before or after his own decease; and in case of the decease of any of his grandchildren before the death of his son, leaving issue, then such issue to take the share that the parents would be entitled to if living.

Held, 1. That each grandchild, the moment it came into existence, took a vested interest in remainder, in fee, subject to open and let in after-born children.

2. That the devise of the remainder to the grandchildren as a class was to be regarded as vested, although all the persons who might take were not ascertained or *in esse*, and could not be, until the termination of the life estate.
3. That one of the grandchildren having died before the termination of the life estate, his share descended to his father as heir at law.

No degree of contingency of an enjoyment in possession by the remainderman will operate to prevent his estate from being regarded as vested.

Per MORGAN, J.

Smiley v. Bailey.

In case of a devise over, which for any reason is incapable of taking effect, and is therefore inoperative, *it seems*, that such devise leaves the estate in the first taker, the same as if the devise over had not been attempted. *Per* MORGAN, J.

SUBMISSION of a controversy without action, under section 372 of the Code. The facts sufficiently appear in the opinion of the court.

L. J. Dowin, for the plaintiff.

M. H. Merwin, for the defendant.

By the Court, MORGAN, J. The case shows that Austin Everett, of Watertown, on the 18th day of April, 1859, made his will, by which, after several bequests not necessary to mention, he gave to his son Elmore all his real estate of which he should die seised, during life. Then follows the clause: "And at and after his decease, I direct that such real estate be equally divided between all my grandchildren, share and share alike; and in case of the decease of any of my grandchildren *before the death* of the said Elmore, leaving issue, then said issue to take the share that the parent would be entitled to if living; and I hereby bequeath such real estate accordingly, and this bequest is not only to include such grandchildren as shall be born before my decease, but such as may thereafter be born."

The testator died January 26, 1860, leaving him surviving Minerva Everett, his widow, and two children, viz., Elmore Everett and Harriet W. Smiley, wife of Velora W. Smiley, his only children and heirs at law. He also left him surviving Richard, Edward A. and William E. Everett, his grandchildren, and the children of Elmore Everett. Also Fred. E. and Charles A Smiley, his grandchildren, and the children of Harriet M. and Velora W. Smiley.

After the death of the testator, Elmore Everett had

Smiley v. Bailey.

another son, born October 12, 1863, named Elmore; and Harriet M. and Velora W. Smiley had a daughter, born October 6, 1867, named Harriet M. Smiley.

Charles J. Smiley died without issue, before the termination of the life estate, March 20, 1865. The life estate terminated by the death of Elmore Everett, Sr., October 13, 1868.

The real estate of the testator consisted of a farm of about 150 acres of land in the town of Watertown, of the estimated value of \$15,000, and was occupied by Elmore Everett, Sr., up to the time of his death. After his death, it was leased, by consent of all the parties in interest, to Nathan Talcott, from whom there is due the sum of \$500 for rent; and the question submitted is whether by the decease of Charles J. Smiley without issue, before the termination of the life estate, his interest in the real estate descended to his father, Velora W. Smiley, by descent, or passed to the other grandchildren living at the time of the termination of the life estate.

The plaintiff, Velora W. Smiley, claims one-seventh of the rent as the heir of his deceased son, Charles J. Smiley, and two-sevenths as guardian of his surviving children, Fred. E. and Harriet M. Smiley. The defendant claims that the six grandchildren, surviving the life tenant, on the termination of the life estate, became entitled to the real estate, and the rent should be divided into six parts, two of which should be paid to the plaintiff as guardian of his two children, and the remaining four-sixths to the defendant, Harvey Bailey, as the guardian of the four children of Elmore Everett, Sr.

The question seems to turn upon the point whether Charles J. Smiley took a vested or contingent remainder. Although other questions are discussed, this is, after all, the only question in the case; and this question seems to be very clearly settled by the provisions of the Revised Statutes defining such estates, by which it is enacted that

Smiley v. Bailey.

future estates "are vested when there is a person in being who has an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain.

I agree with the defendant's counsel, that the remainder is given to the grandchildren of the testator as a class, including all who shall answer that description, whether born before or after his death. Some of this class were ascertained and in existence at the time of his decease; and among others, *Charles J. Smiley*, so that he would have had an immediate right to the possession upon the determination of the precedent estate. If, however, during the continuance of the life estate, a child had been born to Charles J. Smiley, it may be admitted that such child would have had a contingent remainder, depending upon his surviving the death of his father before the termination of the life estate, liable to be absolutely defeated if his father should survive the death of the life tenant, but which would become a vested remainder if his father died during the continuance of the life estate, leaving such son surviving. The estate of Charles J. Smiley was therefore a conditional fee, liable to be divested on the birth of issue—such issue to be substituted in the place of his father, if the father died before the termination of the life estate leaving such issue. This is the only event upon which the estate granted to Charles J. Smiley could be divested by the terms of the will. The will says, in effect, if Charles J. Smiley shall die, with issue surviving, before the termination of the life estate, such issue shall take the estate granted to his father. But the condition never having been performed, upon which his estate was to be divested, it follows, I think, that such estate descended to his heirs. As to vested remainders, they are the subject of ownership, are descendable, devisable, and alienable in

Smiley v. Bailey.

the same manner as estates in possession; and this rule also extends to contingent remainders. (1 *R. S.* 725, § 35. *Willard on Real Estate*, 173.) And in case of a devise over which for any reason is incapable of taking effect, and is therefore inoperative, it seems to be well settled that such devise leaves the estate in the prior taker, the same as if the devise over had not been attempted to be made. (2 *Redf. on Wills*, 646.)

The will in question created an immediate estate in fee in Charles J. Smiley, one of his grandchildren, defeasible upon the taking effect of the executory devise over to his issue. During its continuance it had all the incidents of an absolute estate in fee simple, such as dower, curtesy, &c.; the devisee holding the estate in fee, subject only to a possibility. (*Id.* 653.) It is also settled, says the same author, (p. 648,) "that when a devise is made to one for life, and afterwards to certain other persons by name, and in the event of any such persons entitled in remainder dying during the continuance of the life estate, leaving issue, it creates a vested interest in all thus entitled in remainder, and any one or more of such persons dying during the continuance of the life estate, *without leaving issue, the share of such person will be held transmissible either by will or by descent.*"

It cannot be material, as supposed by the plaintiff's counsel, that the person to whom the remainder is devised should be named, in order to create a vested interest; for by the statute already cited, it is sufficient that there is a person in being, who would, within the terms of the devise, "have an immediate right to the possession." As to the grandchildren born after the death of the testator, and before the death of the life-tenant, they take a vested remainder as soon as they come into being, by the very terms of the statute, liable, however, to be divested in the single contingency that they might die leaving issue before the termination of the life estate. It is admitted that a re-

Smiley v. Bailey.

mainder is contingent by reason of the person who is to take not being ascertained until the termination of the life estate, yet the courts have always been inclined to construe the limitation of the remainder as a vested one wherever the terms in which it is created will admit of such a construction. (2 Wash. Real Property, 510.) A devise to A. for life, remainder to the surviving children of J. S., may be vested or contingent, depending upon the circumstance whether the term relates to the testator's death, or that of A. If to the latter, the remainder must be contingent, since no one can tell who will be such survivors until the death of A.; whereas, if the term relates to the testator's death, and J. S. then have children, the remainder is a vested one, since there is an ascertained person in *esse*, capable of taking the estate *in presenti* at any moment. (*Id.*) And where the devise is to four children by name, subject to be divested upon the happening of a condition subsequent, the remainder is vested, which may however be divested upon the happening of the condition subsequent. But a devise to such of them as survived the tenant for life would be held to be a contingent remainder. (*Id.*) But when the devise is to a class, as in the case at bar, of which each member is equally the object of the testator's bounty; or to the "children" of a person, some of whom are living at the testator's death, the remainder is regarded as vested, although all the persons who may take are not ascertained or in *esse*, and cannot be, until the happening of some future event. As, for instance, upon a devise to A. for life, remainder to the children of J. S., *if J. S. has children at the testator's death, they would take a vested remainder*; and if he were to have other children during the life of A. and *before the remainder was to take effect in possession, it would open and let in the children born during the life of A., who would take shares as vested remainders.* (*Id.* 511.)

No degree of contingency of an enjoyment in posses-

Smiley v. Bailey.

sion by the remainderman of an estate limited to him, affects the question of its being vested or contingent; therefore a remainder contingent at its creation may become vested, though the one to whom it is limited may never himself have an opportunity to enjoy its possession. (*Id.* 526, 527.)

Under the provisions of this will, it is evident that the testator did not devise his lands to such of his grandchildren as should survive the tenant for life, but the lands were given to them as a class. If this is the correct interpretation of the will, it follows, I think, that each grandchild, the moment it came into existence, took a vested interest in the remainder in fee, subject to open and let in after born children; and that Charles J. Smiley having died without issue after the death of the testator, and in the lifetime of his father, the latter succeeds to the estate as heir at law. (*Carpenter v. Schermerhorn*, 2 Barb. Ch. 314. *Vanderheyden v. Crandall*, 1 Comst. 491. *Willard on Real Estate*, 173. 2 *Redfield on Wills*, 648, § 12. *Gray v. Garman*, 2 How. 268, 274.)

In my opinion the plaintiff is entitled to judgment declaring that three-sevenths of the rent in arrear belongs to the plaintiff, one-seventh in his own right, and two-sevenths as the general guardian of Clara B. and F. M. Smiley; and the balance to the defendant as general guardian of Richard F., Edward A. and Austin Everett.

Judgment accordingly.

[ONONDAGA GENERAL TERM, JANUARY 4, 1870. *Mullin, Morgan and Doeltzle*, Justices.]

DANIEL G. FORT, Assignee of James H. Goldey, *vs.* JAMES W. McCULLY and another.

It *seems* that *deposits* made with a private banker who carries on a general banking business, (such as discounting notes and receiving deposits subject to the call of the depositor,) are not to be deemed *due* until demand.

If the banker transfers the depositor's notes before demand made of the deposit, the latter, it *seems*, cannot, under the decisions of the courts of this State, enforce a set-off against the holder, either at law or in equity.

Where, however, a banker failed and made a general assignment of his property, including the notes of the depositor, whose deposit was not then due, and directed his assignee to pay his debts in the same order and manner in which the estate of a bankrupt is required to be used and applied for the payment of debts proved and allowed under the provisions of the bankrupt act; *Held*, that the depositor was entitled to his set-off, and that the assignee could only recover the balance after deducting the deposit.

CASE agreed upon to submit a controversy without action, under section 372 of the Code.

From the year 1863, to and including the 8th day of September, 1869, James H. Goldey was a private banker, (but not an individual banker incorporated under the statute,) doing business in the city of Oswego. The business of said banker, during said time, was the purchase and sale of gold, the making and cashing of drafts, cashing checks, discounting notes and bills of exchange, and taking money on deposit, subject to the call of the depositor.

On the 30th day of August, 1869, said James H. Goldey discounted for the defendants a promissory note in writing, described as follows: dated August 30, 1869, for \$1000, payable thirty days from the date, at the National Park Bank, New York, to the order of J. W. McCully, indorsed by him and signed by McCully and Richards.

On the 2d day of September, 1869, the said James H. Goldey discounted another promissory note for and at the request of the defendants, described as follows: dated September 2, 1869, for \$300, payable thirty days from date at the National Park Bank, New York, to the order

Fort v. McCully.

of J. W. McCully, indorsed by J. W. McCully, and signed by McCully and Richards.

During the time from January 1, 1869, to the time of the submission of this case, the defendants were and still are copartners, doing business as merchants at the city of Oswego, under the firm and style of McCully & Richards.

The said James H. Goldey, becoming insolvent, on the 9th day of September, 1869, made an assignment of all his property to Daniel G. Fort, for the benefit of his creditors generally; and on the day last above mentioned, said assignment was delivered to said Fort, who thereupon accepted the trust, and immediately took possession and charge of all the property belonging to said Goldey at the time of said assignment, and among the same, the two notes above described. The said Daniel G. Fort is now the legally qualified assignee of said James H. Goldey.

The assignment contained the following provision: and the said Daniel G. Fort shall use and apply the said fund for and towards the payment of the debts of the said James H. Goldey in the same order and manner in which the estate of a bankrupt is required to be used and applied, for and towards the payment of the debts of such bankrupt, proved and allowed under and in pursuance of the provisions of the act of congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

Before the time of the making of such assignment, the defendants, or copartners herein before described, had been in the habit, from time to time, of depositing money in the bank of said J. H. Goldey, subject to their check or call. On the 9th day of September, 1869, at the time of the making and delivery of said assignment by Goldey to Fort, the defendants had on deposit in said bank, the sum of the defendants' demanded, and payment thereof was refused on the 16th day of September, 1869, and no demand was made before that day.

Fort v. McCully.

After the notes and each of them became due, the said Daniel G. Fort, as such assignee, demanded payment thereof of the defendants, who thereupon offered to pay to said assignee the sum due on said notes, less the amount of said deposit, and offered therewith, in payment and satisfaction of said notes, to set off the said sum of \$280.38, being the amount of said deposit. The said assignee, (this plaintiff,) refused to allow said deposit as an offset in part payment of the notes, but demanded in payment of said notes the whole amount called for thereby.

The plaintiff claims that said deposit, to wit, \$280.38, is not legal, proper or equitable as an offset, and should not be allowed in part payment of said notes.

The defendants claim that said deposit, to wit, \$280.38, is a legal, equitable and proper offset in part payment of said notes, and should be allowed as part payment thereon.

A. Perry, for the plaintiff.

N. W. Nutting, for the defendants.

By the Court, MORGAN, J. At the time the debtor, *James H. Goldey*, made his general assignment to the plaintiff for the benefit of his creditors, the demand against him in favor of the firm of McCully & Richards (the defendants) was not due. The deposit was payable on demand, and no demand was made until several days after the assignment. (*Downer v. The Phoenix Bank*, 6 Hill, 297. *Clapp v. The Hudson River R. R. Co.*, 19 Barb. 461. *Payne v. Gardiner*, 29 N. Y. 146.)

The assignor, Goldey, having appropriated or assigned the notes of McCully & Richards to pay his creditors generally, before his debt became due to them, the set-off could neither be enforced at law nor in equity, according to the decisions of the Court of Appeals. (*Bradley v. Angel*,

Fort v. McCully.

3 Comst. 475. *Beckwith v. The Union Bank*, 5 Seld. 211. *Martin v. Kunzmüller*, 37 N. Y. 396.)

The only remaining question is whether the assignor has not by the terms of his assignment required the assignee to allow the offset.

I think it is entirely clear, upon the authorities, that if Goldey had been declared a bankrupt, the assignee could only recover the balance after deducting the sum standing to the credit of the defendants upon his books. By section 20 of the bankrupt act, it is enacted "that in all cases of mutual debts or *mutual credits* between the parties, the *accounts between them shall be stated, and one debt set off against the other, and the balance only* shall be allowed or paid, but that no set-off shall be allowed of a claim not provable against the estate." The defendants' demand was *provable*, though not due at the time of the assignment. (§ 19.) And it was also a case of "*mutual credits*." (*Rose v. Hoyt*, 8 Taunt. 499. 2 *Smith's Lead. Cas.* 179, and notes.)

It is also apparent that if Goldey had undertaken to make a distribution of his property contrary to the provisions of the bankrupt act, the defendants could have availed themselves of that act to drive him into bankruptcy, and thus obtained the benefit of its provisions. After demand, these defendants, as creditors, could have proceeded against him at once, and thus avoided any assignment of the debtor which made a disposition of his property contrary to the policy of the bankrupt act, and in contemplation of bankruptcy. This assignment, upon its face, shows that it was made in contemplation of bankruptcy, and as against an assignee duly appointed under the bankrupt act, or those who should claim under him, it would unquestionably be void as a fraud upon the rights of creditors who should come in and prove their debts under the decree in bankruptcy. . (See § 35 of the *Bankrupt Act*; and *per Walworth, Chancellor, in Seaman v.*

Fort v. McCully.

Stoughton, 3 Barb. Ch. 348; *Bell v. Leggett*, 3 Seld. 176, 180, 181.) It was doubtless in view of these decisions that Goldey felt constrained to insert a provision in his assignment requiring his assignee to apply the proceeds of his property "towards the payment of his debts in the same order and manner in which the estate of a bankrupt is required to be used and applied; for and towards the payment of the debts of such bankrupt proved and allowed under and in pursuance of the provisions of the act of congress," &c.

The plaintiff's counsel argues that this relates to the order and ratio of distribution of the fund, but not to the mode of creating the fund. The language of the provision in the assignment is not very clearly expressed; but if it means anything, it requires the assignee to use and apply the proceeds of Goldey's property towards the payment of his debts in the order and in pursuance of the provisions of the act of congress. As that act provides in express terms that an account "shall be stated, and one debt set off against the other, and the balance only allowed or paid," no fund can be created under this provision where there are mutual credits, except the balances thus found due the bankrupt. To allow the plaintiff to collect the notes without allowing the defendants' offset, would, indirectly it is true, but effectually, result in the payment of the assignor's debts, not "in the order and in pursuance of the provisions of the act of congress, but contrary to the rule of distribution therein prescribed, by allowing to the defendants, whose demand was not due at the time of the assignment, only a *pro rata* dividend, instead of the whole amount, as required by the act of congress. But the defendants are to be paid, by the very terms of the assignment, *in the order and in pursuance of the provisions* of the act of congress. The plaintiff desires to avoid this provision by paying the defendants a *pro rata* dividend. Under the bankrupt act they are clearly entitled to be allowed the

Fort v. McCully.

full amount of their demand. The only criticism to be made is, that the word "allowed" is not used by the assignor; but it is obvious that the word "payments," in the assignment, ought to be construed so as to include the allowance of set-off, in the case of mutual debts and credits. The assignee may thus conform to the provision of the act of congress allowing the defendants their set-off, which is one mode of paying the debt. This construction of the assignment will accomplish what the assignor clearly intended by his language.

To give it the construction contended for by the plaintiff's counsel, would invite proceedings by creditors who had offsets which were inadmissible under the decisions of the courts of this State, to compel the assignor to go into bankruptcy, when the assignee would be required to allow them in full; or in other words, these demands would be *paid* in full.

In my opinion, the plaintiff can only recover the balance due the assignor, after allowing the defendants' offset.

The terms of the assignment are so expressed as to justify the assignee in following out the requirements of the act of congress in the distribution of the estate; and this can only be done by the allowance or payment of the defendants' demand in full.

According to the stipulation of the parties, a judgment should be entered in favor of the plaintiff, and against the defendants, for the amount of the notes and interest, less the sum of \$280.83, and interest thereon from the 9th of September, 1869, and in favor of the defendants, against the plaintiffs, for their costs and disbursements.

Judgment accordingly.

[ONONDAGA GENERAL TERM, JANUARY 5, 1870. *Mullin, Morgan and Doolittle*, Justices.]

ALEXANDER MCKINLEY vs. SIDNEY M. TUCKER, Sheriff, &c.

After the liability of a sheriff had become fixed, by the neglect of his deputy to levy, collect or return an execution within its lifetime, the defendant applied to the plaintiff and obtained his written consent, to be exhibited to the deputy, stating that he would not proceed against the sheriff until the maturity of certain notes which the defendant proposed to leave with the deputy, and the avails of which, if paid at maturity, were to be applied by the deputy to satisfy the execution. *Held* that such consent did not *per se* operate to discharge the liability of the sheriff.

The plaintiff in the execution having expressly refused to take the notes, himself, or to do any act to impair his remedy against the sheriff, it was further *held*, that his written consent to postpone proceedings against the sheriff until the maturity of the notes thus put into the hands of the deputy did not operate as a ratification of the prior neglect of the deputy which created the liability.

Otherwise, it *seems*, if the plaintiff, after a valid levy, had consented to the arrangement, and to a postponement of a sale of the defendant's property in the meantime.

The language of a writing may be interpreted, and its true meaning ascertained, in the light, and by the aid, of the circumstances under which it is made.

ACTION against a sheriff for not collecting or returning an execution. The defense was that the plaintiff gave directions to the deputy holding the execution, with reference thereto, which were complied with by the deputy, who thereby became the agent of the plaintiff, and which released the sheriff from all liability for the acts or neglects of the deputy in not returning the execution.

It appeared before the referee, to whom the action was referred, that the plaintiff recovered a judgment in the Supreme Court against S. Newell Dada and Sidney S. Morrill, on the 20th day March, 1868, for \$435.74, and that an execution was issued to the defendant as sheriff of Oswego county, where judgment was docketed, on the 24th of March, 1868, which was on the same day delivered to his deputy, George Folger.

Mr. Dada was sworn on the trial, and produced the execution. He testified that on the 22d day of July, (after

McKinley v. Tucker.

the return day of the execution,) he saw the plaintiff, in his hay-field, and arranged with him to let Folger have two notes, made by Howard Allen and indorsed by himself and Willard Johnson, and have the deputy, Folger, hold the execution a further time; the notes, when paid, to apply on the execution. One of the notes was paid to Folger, November 1, 1868, a portion of which Folger paid over to the plaintiff. When he made the arrangement, the plaintiff gave him a writing, in pencil, which read as follows:

“George Folger. Take the two notes, of \$100 each, made by Howard and indorsed by Willard Johnson, and hold the same till due; and when paid, apply them on execution against Morrill and Dada, and I will not hurry you on ex.

(Signed)

ALEXANDER MCKINLEY.”

He further testified, that upon his return to Fulton, the same day, he handed this writing to Folger, the deputy; and also the two notes for \$100 each.

The defendant also gave evidence to show that on the 11th of December the plaintiff wrote a letter to Folger, the deputy, requesting him to close up the execution the 1st of January.

The plaintiff was then sworn, and testified as follows: “I am plaintiff in this action. I remember the time when Mr. Dada came to see me about taking some notes. He had some papers with him, he said were notes, and asked me to take them. I said no, I can’t accept them, and that I had written to Folger I would not accept the notes. He said Folger said he might say to me, for Folger, that he (Folger) would back the notes if I was not satisfied. I said Folger could take them if he desired. I should look to him for my pay, and would have nothing more to do with Dada. Dada says, let me say to Folger that you will let it rest where it is until those notes become due. I told him I would not do it. I would not make any agreement,

McKinley v. Tucker.

or do anything that would release the sheriff. That I would give no directions concerning it. Dada urged me, and said it was but short time, and the sheriff was already liable to me, and it would make no difference to me, and asked me to let it stand just as it did then. I then said I would let it stand just as it is. He said, just give me a line to Folger, that you will not prosecute till the notes become due, and then he wrote in a memorandum book something of that kind, and I signed it. Dada said it would not affect my right to collect of the sheriff. On the 28th of October, 1868, I saw Folger. I then asked him why he had not collected the execution. Folger first said my attorney had given him time, and finally said he was mistaken; and then said Mr. Briggs said it would make no difference with me. He said I did not want the money, and he thought I would accommodate Dada. I told him I thought the sheriff was liable for delay. Folger said he could take two years to collect it; he was not obliged to collect it in sixty days; but said in a few days, on return of Mr. Dada, who was absent, he would collect and close it up. I asked him about those notes, and whether they were paid or not. At first he was entirely ignorant as to anything about them; he thought he had had such notes, and put them in the bank. I went to the bank with Folger, and they could not be found at the bank. Folger went up to the office and said he had such notes, but handed them to Dada at the time he (Dada) came to see me, on the 22d of July, and had not received them after that. A few days after, I received a check for ninety-five dollars, in a letter, wherein he (Folger) wrote that the other note was not due till December, and that Dada said I had agreed for the balance, besides notes, to wait longer. In December I received another letter saying that the December note had not been paid, but that he (Folger) would pay that himself. I then wrote the letter produced,

McKinley v. Tucker.

of date December 11, 1868." Cross-examined by the defendant, says: "I received the money on the check."

The referee found the following conclusions of law:

1st. That deputy Folger assumed the office of private agent, and held over and delayed the collection of said execution upon the presumed assent of the plaintiff or his attorney until July 22, 1868, when the plaintiff, by the execution and delivery of said writing, and by other circumstances herein before described, made said Folger his (plaintiff's) agent, and adopted and ratified the prior acts of said Folger in the matter of the collection of said execution. To which the plaintiff excepted.

2d. That the defendant was thereby relieved and discharged from all liability arising from the failure to execute or return the said execution. To which the plaintiff excepted.

And he ordered judgment dismissing the plaintiff's complaint. Judgment having been entered for the defendant, the plaintiff made a case, containing his exceptions, and appealed to this court.

D. Pratt, for the plaintiff.

This case is distinguished from any reported case I have been able to find. The execution had been running four months after its receipt by the sheriff; no levy had been made, and no money collected; and by lapse of time the sheriff was entirely powerless as to any legal right to enforce the collection; and unless the defendant voluntarily paid, nothing could be made thereon. At the expiration of sixty days after the receipt by the sheriff of the execution, it not having been returned or paid, a cause of action had accrued in favor of the plaintiff against the sheriff for not returning the execution. (3 *Seld.* 550. 21 *N. Y.* 481. 3 *Hill*, 552.) The defense proceeds entirely upon the ground that the plaintiff gave specific directions to the deputy concerning the execution, and thereby re-

McKinley v. Tucker.

leased the sheriff from all liability in not returning the execution as he was commanded. There is no pretense that the plaintiff gave any direction in regard to the execution until after default in the sheriff to return it as he was commanded, and after the plaintiff's cause of action had accrued against the sheriff.

I. Specific directions by the plaintiff to the deputy must be such as to cause the deputy to commit such acts, which, had he committed them without such directions, the sheriff would be liable to the plaintiff in an action for such acts. (*Godfrey v. Gibbons*, 22 *Wend.* 569.)

II. Specific directions must be such an interference as will divest the deputy of his general character and discretion belonging to his office, and substitute him for special deputy for special service. (*Tuttle v. Cook*, 15 *Wend.* 274. *Walters v. Sykes*, 22 *id.* 566.) The plaintiff may direct the deputy in the matter of the collection of his execution, and the sheriff will be liable if the deputy does not follow his directions, and the giving of such directions will not release the sheriff. (*Sheldon v. Payne*, 3 *Seld.* 453. *Root v. Wagner*, 30 *N. Y.* 9.) It will be seen that the directions given must be positive, and also imperative, in order to release the sheriff. 1. In the case at bar, the directions were merely permissive, although the paper in pencil mark alone, looks towards a direction, but when connected with explanatory evidence, it is merely a permission. 2. The direction or permission, whichever it may be termed, neither curtailed or enlarged the powers of the deputy as to the collection of the execution; it neither commanded or prevented him from collecting the execution at once if he desired to do so. 3. The notes were not to apply on the execution, and the deputy could have safely held the notes until they became due, and if paid, applied the money on the execution without any directions from the plaintiff; and no liability against the sheriff

McKinley v. Tucker.

would accrue in consequence of such acts, and none of the parties have been affected by the transaction.

No credit was given on account of those notes; if paid the deputy was permitted to apply the money on the execution; if not paid, they were to make nothing for the plaintiff on the execution; they were no security; they were not to be sold as property levied on the execution, and could in no way enure to the benefit of the plaintiff who was already secured by his action against the sheriff.

This seems to dispose of this case with the following exceptions, viz: can a party, having a legal right of action against another party, suspend the remedy and not destroy his right of action, and his right to prosecute after the time for which he suspended?

It is supposed that a party may and has a right to suspend his remedy for a time, definite or indefinite, at his pleasure, and not diminish his right to prosecute, if within the limits of the law, and if so, an assertion by him that he will suspend, certainly will not affect his right of action. I know of no rule to compel a party to prosecute, and there is no consideration for the release of a good cause of action which he has already accrued.

The referee decided this case upon the reasoning of Judge Cowen in *Corning v. Southland*, (3 Hill, 552,) and held that case to be decisive of this case. In that case there was an adequate levy; in this case there was no levy, and the execution was not secured, or any part of it.

There is no doubt that the plaintiff was willing to be lenient, but we deny that his saying to Dada or Folger he would not prosecute the sheriff till the notes became due amounted to an adoption or ratification of the prior acts of the deputy.

S. N. Dada, for the respondent.

The report of the referee, as to the facts of the case, is fully sustained by the evidence. His conclusions of law

McKinley v. Tucker.

are correct. The deputy assumed the office of private agent of the plaintiff, and upon the presumed assent of the plaintiff or his attorney, held over and delayed the collection of the execution until July 22, 1868, when the plaintiff giving specific directions to the deputy which were carried out, made the deputy his agent, and adopted and ratified his prior acts, and thereby relieved and discharged the defendant from all liability arising from the failure to execute or return said execution. (*Corning v. Southland*, 3 Hill, 552. *Gorham v. Gale*, 6 Cowen, 467, n. *Mickles v. Hart*, 1 Denio, 548. *Sheldon v. Payne*, 3 Seld. 458.)

MORGAN, J. The courts have doubtless gone a great way to relieve the sheriff from responsibility for the neglect of his deputy, when the circumstances were such as to authorize the inference that such neglect was occasioned by the improper interference of the plaintiff in the execution. After a levy has been made, almost any interference with the duties of the deputy would operate to relieve the sheriff from liability. But when the deputy, relying upon the defendant in the execution to pay it, and for his special accommodation, has suffered the execution to run out in his hands and the consequent liability of the sheriff has become fixed, it is not perceived how the mere passive acquiescence of the plaintiff in a further delay in order to give time to the deputy and defendant in the execution to make the money, can be said to operate *ipso facto* as a release of the cause of action against the sheriff.

It will be observed, that according to the plaintiff's evidence, which is hardly contradicted or impaired by that of Mr. Dada, he absolutely refused to take the notes or have anything to do with them himself, or to make any agreement or do anything that would relieve the sheriff; but that he was finally prevailed upon to say that he would let the matter stand just as it was until the notes matured.

McKinley v. Tucker.

Mr. Dada wanted a line to the deputy to show that he, (the plaintiff,) would not prosecute till the notes became due, and drew up a note to the sheriff which the plaintiff signed, in which the plaintiff said to the deputy: "You take the notes * * * and hold till due * * * and I will not hurry you on execution." If the execution had not already run out, doubtless such a writing would have been fatal to the plaintiff's remedy against the sheriff for not returning it.

The learned referee held as matter of law, that the deputy thereupon assumed the office of private agent, and held over and delayed the collection of said execution upon the presumed assent of the plaintiff or his attorney until July 22, 1863, when the plaintiff by the execution and delivery of said writing, and other circumstances before described, made said Folger (the deputy) his agent, "*and adopted and ratified the prior acts of said Folger in the matter of the collection of said execution.*"

If this conclusion is warranted by the writing and other circumstances detailed in the evidence, as a matter of law, it is a conclusion directly against the declared intention of the plaintiff when he signed the writing, and the obvious understanding of all the parties. If, however, we construe the writing in the light of the plaintiff's evidence and by the aid of the circumstances appearing upon the trial, the most the plaintiff would or did agree to, was, that he would not prosecute the sheriff, or in other words, "*hurry the deputy on the execution,*" until it was known whether or not the notes would be paid.

The evidence has satisfied me, that all the parties understood the sheriff's liability had become fixed by the omission of the deputy sheriff to levy or return the execution; and under these circumstances, the plaintiff relying upon his remedy against the sheriff, refused to interfere or promise anything, except that he would forbear to resort to his remedy against the sheriff, until the deputy

McKinley v. Tucker.

should have an opportunity of making the money out of the two notes, which the defendant Dada had gotten up for that purpose. If the writing is made to operate in a way to destroy the plaintiff's remedy against the sheriff, then I think he has been evidently overreached, and induced to sign a paper which did not express his intentions. Under the circumstances, I am of the opinion that it will bear a different interpretation; and that the plaintiff only agreed, that if the deputy took the notes, and held them until due, he would in the *meantime* forbear to take his remedy against the sheriff for not returning the execution.

Such an agreement is in no way prejudicial to the sheriff, but rather for his benefit, as well as that of the deputy, who is liable over to the sheriff. It, in legal effect, reserves the right to prosecute the sheriff, and there is no principle of law or morals that would justify the sheriff in taking advantage of it to escape liability.

It may be asked, with great pertinence, what duty the deputy owes to the sheriff or any body else, except the plaintiff, *after* he has suffered an execution to run out in his hands for over two months after the return day, for the accommodation of the defendants in such execution. The law does not impose any further duty upon him, except it be to return the execution, not for the benefit of the sheriff, but to enable the plaintiff to take his remedy against the sheriff.

But here the deputy did not assume a new duty or obligation inconsistent with his official duty; for his official duties were ended, except to return the execution. That duty continued, but he was prevailed upon by the defendant to abstain from its performance a short time longer, to give him an opportunity to pay the execution out of the proceeds of certain notes which he exhibited to the deputy. The deputy, it may be assumed, was fearful that if he waited till the notes matured, before returning the execution he would be ruled to return it, and the sheriff would

McKinley v. Tucker.

be sued. The defendant in the execution, therefore, proposed to see the plaintiff, who was alone interested in hurrying up the deputy, and procure his consent to the delay. The plaintiff was seen accordingly, and was finally prevailed upon to say that he would not proceed against the deputy or sheriff until the notes became due. He therefore writes to the deputy that he would not "hurry" him on the execution until the notes matured. This is the substance of the whole transaction.

There is no solid ground of principle upon which such a promise of the plaintiff to forbear his remedy against the sheriff, for a short time, to give the defendant an opportunity to pay the execution, can be construed into an interference with the official duties of the deputy sheriff, or as an act prejudicial to the sheriff; or as a *ratification* of the *prior delay* of the deputy, which created the liability. On the contrary, the plaintiff, by the very terms of the arrangement, refuses to ratify the *prior delay*, or to abandon his claim against the sheriff.

The cases cited by the respondent's counsel do not lay down any rule inconsistent with this conclusion. In *Gorham v. Gale*, (6 Cowen, 467,) the deputy, in making sale of the land of the defendant in the execution, acted under the instructions of the creditor, and took a course out of the line of his duty as a public officer, by giving credit and selling the land for less than the execution. In *Corning v. Southland*, (3 Hill, 552,) the proposal of the plaintiff to the deputy to take a note, was *before the return day*; yet as it was not got up according to the proposal, the sheriff was held responsible for not returning the execution. In *Mickles v. Hart*, (1 Denio, 548,) the instructions to the deputy were to make a levy, and do nothing more until further instructions. After four months the plaintiff directed the deputy to sell, which he neglected to do until it was discovered that the property had been removed, and could not be found; and it was *held* that the sheriff

McKinley v. Tucker.

was not liable for the default of the deputy in not collecting the execution. In this case, it is clear that the plaintiff had taken the matter into his own hands from the beginning. And in *Sheldon v. Payne*, (3 *Seld.* 453,) the deputy refused to follow the plaintiff's instructions. Ruggles, Ch. J., says: "The deputy neither acted in the line of his duty as prescribed by law, nor did he obey the directions, or act within the authority given him by the plaintiff." And it was *held* that the sheriff was liable, as the deputy sheriff did nothing in conformity with the instructions.

None of these cases decide that the sheriff is discharged by the promise of the plaintiff, that he will not take his legal remedy against the deputy or sheriff for a liability already incurred, until a future day, although the object of it is to give the defendant in the execution time to pay it before it is actually returned. Such an arrangement is more for the benefit of the sheriff than the plaintiff in the execution, is humane towards the defendant, and ought not to be discouraged.

The judgment should be reversed.

DOOLITTLE, J., concurred.

MULLIN, J., dissented.

Judgment reversed, and a new trial granted, with costs to abide the event.

[ONONDAGA GENERAL TERM, April 5, 1870. *Mullin, Morgan and Doolittle, Justices.*]

KEENEY & BROWN *vs.* THE GRAND TRUNK RAILWAY
COMPANY.

The defendant, a common carrier, received from the plaintiffs, at Goderich, in Canada, a number of cattle, upon its cars, under a special contract, by which it undertook to forward them to Buffalo, to the consignee, "subject to their tariff, and conditions expressed." In these conditions it was expressed that the owners undertook all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise; and that the defendant did not undertake to forward the animals by any particular train, or at any specified hour, and was not responsible for the delivery thereof within any certain time, or for any particular market. The cattle were started the same day and taken a part of the distance, and had the cars containing them gone on, with the train, would have reached Buffalo the same night. Instead of this, the cars, when within sixty or seventy miles of that place, were by a positive and peremptory order from the defendant's freight superintendent, detached from the train and placed upon a side track where the cattle could neither be fed nor watered, nor with any safety be unloaded, and were there detained three or four days, and several of the animals perished from hunger and the inclemency of the weather, and others were greatly reduced in flesh, weakened and otherwise injured.

Held, 1. That according to the "conditions expressed" in the special contract, the defendant could not, in this manner, and for this length of time, suspend the performance of the undertaking it had thus commenced, without rendering itself liable to the plaintiffs for the damages occasioned by such suspension.

2. That the "conditions" did not extend to a case of damage arising from the deliberate and intentional act of the defendant, or its agents, in suspending performance after it had been commenced, and refusing to perform, or to allow performance, until after the property, or a portion thereof, had been destroyed, and other undertakings could be performed. In other words, that the defendant did not reserve to itself the right to perform or not as it might afterwards elect, or to perform only as it might suit its interests, convenience or pleasure.
3. That this was not a case of an injury arising from *negligence*, in any degree, but a case of an injury arising from a deliberate and intentional refusal to perform, for the time being, the undertaking of the defendant.
4. That such refusal by the defendant's freight agent, to perform the contract, was the act of the defendant, and the defendant was liable for the consequences, so far as his act or order had the effect to prevent performance, and thus create a breach of contract. And this, whether the agent was authorized to make the order or not.

Where the object of a contract is to relieve a party undertaking to perform a duty from some of the obligations and liabilities which the law imposes upon

Keeney v. Grand Trunk Railway Company.

him in the absence of any express stipulation, it is to be construed in reference to that object and purpose.

General expressions exempting a party from liability on account of injuries to property committed to his charge, should never be held to apply to injuries arising from the wrongful acts of the party undertaking, unless it is expressly so stipulated.

In every case where a party who has engaged to perform certain labor or services employs others to perform on his account, and such others, after commencing to perform, refuse to go on, or to allow the work to proceed, such refusal is the refusal of their employer; and if it amounts to a violation of the contract, it is the breach of the employer. Their misconduct, in such a case, is his misconduct, so far as it operates upon the contract and occasions non-performance.

A general carrier of freight has no right to discriminate, in forwarding freight, between different owners, in favor of one class, to the prejudice of others, by deliberately stopping or delaying the property of one person, in order to give a preference to that of another, contrary to the ordinary course of business.

It seems that the negligence, against liability for which, a railway company is not permitted to contract, must be confined to that of the board of directors, or, at all events, cannot be extended beyond that of those managing officers who make the general regulations, for the running of the trains and the transaction of the business of the road, for the government of others, binding upon all the subordinate agents. *Per TALCOTT, J.*

APPEAL by the defendant from a judgment entered upon the verdict of a jury.

The plaintiffs alleged, in the complaint, that the defendant was, and still is, a corporation duly incorporated under and pursuant to the laws of the Province of Canada; and was, and is, engaged in transporting freight and live stock over its road, and other railroads used, operated and controlled by said defendant, extending from Detroit, Michigan, to the city of Buffalo, in the State of New York, and through said Province of Canada, as a common carrier for hire. That, during the same time, the plaintiffs were copartners, and were, as such copartners, engaged in buying cattle in said province, and shipping them to the State of New York, for sale; and that on the 15th day of March, 1866, they delivered to the defendant, as such common carrier, at Goderich, in said Province, being a station upon

Keeney v. Grand Trunk Railway Company.

its said road, a large number of cattle, to wit, fifty-eight, consisting of dairy cows and oxen, which were accepted and received by said defendant, to be carried and transported by railroad from Goderich aforesaid, to the city of Buffalo; and the defendant, then, in consideration of the usual compensation therefor, agreed to be paid by the plaintiffs, did undertake and agree, as such common carrier, to carry and transport said cattle on its said railroad, or roads used and controlled by it, without delay, to the city of Buffalo, and there to deliver the same to the plaintiffs in good condition. That in pursuance of said agreement and undertaking, the defendant did receive and ship said cattle upon its cars, and on the same day started said cars containing said cattle for Buffalo, pursuant to said agreement and undertaking; and on the following day, to wit, on the 16th day of March, 1866, the plaintiffs delivered to the defendant, at Goderich, aforesaid, seventy-nine other cattle, which were accepted by the defendant, under said agreement, to be delivered to the plaintiffs in Buffalo, in like manner; and were, on the same day, shipped by said defendant, on its said road, for said city of Buffalo; but the defendant, in violation of its said agreement and undertaking, and of its duty and obligation as such common carrier, neglected and refused to transport said cattle to Buffalo; but that the defendant carried and transported said cattle to Brantford, a station between Goderich and Buffalo, and distant about sixty miles from Buffalo, at which place the defendant caused the cars containing said cattle to be detached from the train, and placed upon a switch, or side track, and detained the same on said side track a long time, to wit, two days and over, during which time the said cattle were without food or water; and the defendant would not permit said cattle to be taken from said cars to be fed or cared for. That the floor of the cars containing said cattle became frozen, and covered with ice, and slippery; and said cat-

Keeney v. Grand Trunk Railway Company.

tle, from their great hunger and thirst, and the condition of the floors, became useless and weak, and were thrown down upon each other, and were greatly bruised and injured, so much that a large number thereof were unable to stand upon their feet or to move, of which bruises and injuries, and from hunger and thirst, a large number thereof died, and were left at Brantford by the defendant, and were not delivered at Buffalo; and a large number of said cattle afterwards died of said injuries, and became worthless and of no value; and all of said cattle became, on account of such negligence and misconduct of the defendant, greatly injured and depreciated in value; and the plaintiffs were subjected to great loss and expense, and were obliged to expend large sums of money in doctoring and feeding said cattle, in endeavoring to cure and recruit the same, and fit them for sale or market; and that they had sustained damages to the amount of \$2545, for which sum they demanded judgment and costs of suit.

The defendant, for its first answer and defense, admitted that it was a corporation, and engaged in the business of transportation, as alleged in the complaint. And denied that the defendant ever made the contract with the plaintiffs, alleged in the complaint; or that it had been guilty of any violation of any agreement with the plaintiffs, as is alleged in the complaint, or otherwise; or of any breach of duty or obligation to the plaintiffs, in the manner alleged in the complaint, or otherwise. And as to all the allegations of the complaint, not specifically admitted or denied to be true, the defendant denied that it had knowledge or information sufficient to form a belief in respect thereto, and it therefore controverted the same.

And for a second answer and defense, the defendant alleged that at or about the times mentioned in the complaint, certain cattle were shipped and transported over the road of the defendant, by, and for one Keeney, which the defendant believed to be the same cattle and the same ship-

Keeney v. Grand Trunk Railway Company.

ments described in the complaint; and that all of said cattle, and all cattle, stock, and animals of every kind, transported by the defendant for the plaintiffs, or either of them, during any of the times mentioned in the complaint, were delivered to the defendant, and the same were accepted and the transportation of the same undertaken by the defendant, under and in pursuance of an agreement and conditions entered into by the shippers and owners of the same with the defendant, by which the shippers and owners undertook all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise; and by which the defendant was not obliged, and did not undertake to forward the same by any particular train, or at any specified time; nor was the defendant to be responsible for the delivery of the same, within any specified time.

For a third answer and defense, the defendant alleged that it was a corporation existing under the laws of Canada, as alleged in the complaint; that its road lies in Canada; that it has no power to contract to carry property beyond the Province of Canada; that any injury done to any property of the plaintiffs, by the defendant's neglect, or otherwise by the defendant, was done while said property was being transported in Canada, and under a contract made in Canada for their transportation in Canada, and not elsewhere, and under the agreement and conditions in form and substance as before set forth. And the defendant further alleged, that by the laws of the Province of Canada such agreement and conditions were, in all respects, valid and binding; and that such agreement and conditions, under said laws, relieved the defendant from any liability whatever for any of the supposed matters set forth in the complaint.

And for a further answer the defendant alleged that at the times mentioned in the complaint, the defendant's road, and the roads employed by it, were, in all respects, in good order, and well equipped with cars, engines and other neces-

Keeney v. Grand Trunk Railway Company.

sary appurtenances for the performance of its business; and that it provided sufficient accommodation for the transaction of its business, under all ordinary circumstances; that all delay in the transportation of the plaintiffs' property was caused solely by an extraordinary press and accumulation of freight, which could not be provided against, caused by the anticipated termination of the so called Reciprocity Treaty between England and the United States, and by obstructions to the navigation of the Niagara river, and not by any negligence or fault whatever of the defendant.

The action was tried before Justice MARVIN and a jury, at the Wyoming circuit, in April, 1869.

The plaintiffs, to maintain the issues on their behalf, proved that they were the owners of the cattle mentioned, and that they were damaged by the delay at Brantford, herein after described, to the amount of the verdict rendered, as herein after stated. And further to maintain the action, they called as a witness Mattison Keeney, who testified as follows: "I reside in Warsaw, and did in 1866; I am one of the plaintiffs in this action; in 1866 I was bringing cattle from Canada, in company with John Brown; we were partners in the business; I shipped cattle on the 15th of March, 1866, two car loads; there were about fifty head of cattle in both car loads; I came to Brantford with the cattle, one hundred and some odd miles from Goderich, where they were shipped; they arrived at Brantford on the evening of the 15th of March, and they were there switched off, but not at my direction; Mr. Brown arrived the next day, about 9 o'clock in the forenoon, on the 16th of March; we had about one hundred and thirty head, in all three car loads; Brown's cattle were also switched off; the engines were detached; the weather was stormy and bad, and the cattle were exposed; I could not feed, water or unload them; I think I asked to have them unloaded, and afterwards to have them carried on; the agent, or "dispatcher," switched them; they were

Keeney v. Grand Trunk Railway Company.

started on about noon, March 18, for Buffalo; they arrived at Buffalo about 12 o'clock at night, on the 18th or 19th of March, 1866; they were unloaded in the forenoon of the 19th of March; they were loaded at 11 A. M., March 15th; they had not been fed or watered from the time they were loaded until they were unloaded; they were loaded in good condition; some of the cattle got down at Brantford, and we pulled seven head out of one car that were dead, or about dead; I have never seen anything of those cattle; I paid freight at Buffalo; I paid Hoover, the agent, regular rates; I think \$33 in gold per car; the cattle were in a bad condition when they got at Buffalo; got all of them to the cattle yard except seven; I think three or four of them were pulled out at Buffalo, and left dead; the cattle left dead at Brantford were worth about \$50 per head in gold, \$350 in all; the three that were left on the platform at Buffalo were worth about \$50, or more, \$150 in all; I lost fourteen head in all, worth \$50 each, on an average; dairy cows principally, a few oxen and a few heifers; I think we lost \$15 per head on the balance, over and above the fourteen lost outright; had 130 head in all, fourteen of them were lost; 116, at \$15 a head damage; I could not unload them at Brantford without getting to a shute, and I could not get to a shute; they were left on a switch, no engines attached to the trains; we could not feed or water them."

Being cross-examined, the witness further testified: "I had been engaged in buying and shipping cattle, more or less, for ten years; had shipped cattle over defendant's road at different times during two years; the defendant never paid us anything for the damage to the cattle; I received \$68 for cattle sold at the yard in Buffalo."

The defendant's counsel then introduced in evidence two agreements, the signatures being admitted, being all printed, except the dates, signatures, number of cars and cattle, as follows:

Keeney v. Grand Trunk Railway Company.

"No. 123.

GRAND TRUNK RAILWAY.

LIVE STOCK TICKET.

15th March, 1866.

The Grand Trunk Railway Co. will please receive the undermentioned, consigned to M. Keeney, and forward to Buffalo, subject to their tariff and conditions expressed on the other side.

No. of Cars.	Quantity.	Description.	Rate. \$ cts.	Amount. \$ cts.	Paid on \$ cts.	Paid. \$ cts.	To Pay. \$ cts.
2705							
1759	58	Cattle.	32 60				97 80
514							
Totals.							

[On the other side of the above is the following:]

GRAND TRUNK RAILWAY.

CONDITIONS OF CARRIAGE.

I. The owners of the within mentioned animals *undertake* all risk of loss, injury, damage, and other contingencies, in loading, unloading, conveyance, and otherwise.

II. The railway company *do not undertake* to forward the animals by any particular train, or at any specified hour; neither *are they responsible* for the delivery of the animals within any certain time, or for any particular market.

III. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company *are not responsible* for any negligence, default, misconduct, or otherwise, on the part of the company, or their servants, or of any other person whomsoever, causing or tending to cause the death, injury or detention of persons with such free passes; and that whether such passes are used in traveling by any regular passenger train, or by any other train whatever.

I agree to the above conditions.

M. KEENEY,

Owner, or on the owner's behalf."

Keeney v. Grand Trunk Railway Company.

It was admitted that the name "M. Keeney" was signed by the plaintiff Keeney.

The other contract (numbered 124) was in precisely the same form, embracing 79 cattle, and the conditions were signed by the plaintiff Brown. It was dated March 16, 1866.

It was also proved, that at the same time the defendant, by its agent, executed and delivered to each of the plaintiffs a contract, agreeing thereby to receive and transport said cattle from Goderich to Buffalo on the conditions expressed on the other side of said contract; that upon the other side of said agreements were printed conditions, as in said first mentioned agreements.

Cross-examination continued: "I bargained for transporting the cattle at so much a car; I was present when they were loaded; I made the contract at the same time I shipped the cattle; I expected to pay regular rates; I went to the defendant's agent and told him I wanted to ship so many cattle; I signed the agreement after the cattle were loaded on the cars; I left Goderich on the 15th of March, after dinner; I rode in rear car; at each station I saw the cattle; arrived at Brantford Thursday night; I spent the night in the depot; did not go to bed; these cattle were switched off as soon, or nearly as soon, as I got to Brantford; before I left for Buffalo, on the morning of the 16th, I don't think I spoke about their going on with the cattle; I hired a man and left him in charge of my cattle; I did not furnish him with any money; he was a man accustomed to taking care of cattle; Friday morning I went to Buffalo, and I think Saturday morning I went back to Brantford; got there in the morning, and stayed there till the next day; I did not do much the next day; Sunday, the 18th of March, I went again to Buffalo, and saw Mr. Hoover, and complained to him of the delay and detention of the cattle; I did not go to see Mr. Barnard, at Fort Erie; I saw Hoover both days,

Keeney v. Grand Trunk Railway Company.

on Sunday, and each day the cattle were on the switch at Brantford; the reciprocity treaty expired on Saturday, the 17th, and it was understood so with the agent, I supposed, and we talked that after that there would be a duty on the cattle, after Saturday; I knew there was considerable freight on the road; I was hurrying my cattle through before the expiration of the treaty; cattle had been prohibited from coming to the United States on account of disease, a short time before this transaction."

On his re-direct examination he testified: "It is customary for the owners of cattle to go on the cars with, and to look after them on the route; the defendant's agent refused to ship the cattle, unless I would sign the contract."

George H. Hoover was sworn as a witness for the plaintiffs, and testified as follows: "I resided in Buffalo during 1866; I was live stock agent of the Grand Trunk Railway Company at Buffalo; Barnard was the division freight superintendent of the road; he had charge of running trains; he had general authority to control running trains on that part of the road; his headquarters were at Brantford; I knew Keeney and Brown; their cattle arrived in Buffalo on the morning of the 19th of March; they were taken from the cars as soon as it was light; I received from the plaintiffs regular tariff freight for carrying the cattle."

On his cross-examination he testified as follows: "These passes are for allowing men to go down with their cattle; they are also good on passenger trains; cars are mostly slot cars, some of them are combination cars, with gratings; in shipping cattle, owners cannot procure the pass without signing the contract; can't say that they will receive cattle at all without signing such a contract; always give pass for one man to each car; I would not ship cattle without such contract being signed; I was familiar with the business of the company; I received \$85 for plaintiff's cattle, which were sold by the defendant's agents, and

Keeney v. Grand Trunk Railway Company.

was instructed to pay it to plaintiffs, but before I saw them the order was countermanded; no cattle would be shipped on defendant's road without signing the printed conditions; the pass and conditions are together; no one could ship cattle without taking the pass to accompany them; the company gave one pass for every car, and would not ship on any other terms."

John Brown being sworn for the plaintiffs, testified as follows: "I am one of the plaintiffs in this action; I started with three car loads of cattle on the 16th of March, at about 11 A. M.; I had seventy odd head; they were shipped on defendant's cars at Goderich; we did not have quite as many as the bill showed; I think there was a mistake in counting them; there were 130 odd head in all; I reached Brantford at 9 P. M., March 16th; the cattle were switched at Brantford, without my consent or direction; there was no difficulty in going on from Brantford; there was no obstructions; I remained there from the 16th to the 18th of March; I did not go to Buffalo with the cattle; I reached Buffalo Sunday, 19th of March, after midnight; at Goderich I signed this paper, (being the second contract above mentioned;) the cattle were loaded before the paper was presented; the agent assisted me in loading the cattle; we were a little late about shipping our cattle; they said they would not ship the cattle unless we signed the paper; at Brantford we tried to have the cars switched so we could take out the cattle; the agent, Fenton, said he had orders to hold the stock; I tried to have the cattle moved off; I could not feed or water the cattle where they were; the cattle were getting down; it was cold at the time; at Brantford we pulled out some cattle that were dead, or nearly dead; I did not see the cattle in Buffalo, until they were at the yards; I first saw them on Monday at the yards; their condition was bad; the cattle should have been at Buffalo the next evening after they were shipped; they should have gone from Goderich to

Keeney v. Grand Trunk Railway Company.

Buffalo in 22 hours; the cattle, when put on board at Goderich, were store cattle—some fleshy, some cows; when they arrived at Brantford they were all in good condition, and not down; I got at Brantford the 16th of March, at evening, and was there that night and the next day, and left there and left the cattle with Mr. Allen; I took care of Keeney's and my own cattle at Brantford; all cattle cars were switched; trains were constantly running past with grain and lumber; while on the switch, German E. Allen helped me take care of the cattle; we did what we could to keep them up; we pulled out some dead ones."

On his cross-examination he testified as follows: "Cattle are not frequently kept in cars 48 hours, so far as I have shipped; the cattle came into Goderich a day, or a day but one, before they were shipped, and were fed there; we were in a hurry when we shipped them, the agent hurried us, as it was getting train time; my cattle left Goderich the day after Keeney's left; at Stratford we waited two hours for stock train from Sarnia; reached Brantford in the evening; I sat up that night with the cattle; next morning I saw Fenton, the freight agent, and asked him if he could get the cattle switched; I tried Saturday to get my cattle unloaded; I asked Fenton if the cattle could be switched so we could unload them; there was only one shute there; we did get one car down, and pulled out some dead cattle, then had orders to move on; I left the cattle there in Allen's charge; I came home, and went back Monday morning."

The plaintiff then read in evidence the following stipulation, signed by the defendant's attorneys: "It is hereby stipulated that it shall be admitted to be true, upon the trial of this action, without proof, that on the 16th day of March, 1866, J. F. Barnard, the local superintendent of the Grand Trunk Railway from Fort Erie to Brantford, at about the hour of 5 P. M. on that day, sent from Fort Erie to the telegraph operator of the company at Brantford, a

Keeney v. Grand Trunk Railway Company.

telegram, of which the annexed paper, marked "A," is a copy."

"A."

"March 16th, 1866.

Fort Erie operator, Brantford:

Austin must return from Fort Erie to Port Colborne, after arrival at Fort Erie, to clear out Port Colborne. The next special must bring forward from Dunnville all the cars that were left there from the wreck which may be able to run. Arrange for as many specials to-morrow as will clear up the flour, grain, beef and pork, keeping back all stock, staves and lumber. There will be no duty on stock. There is now a duty on staves, which will not be increased, and that on lumber is comparatively light.

(Signed)

J. F. BARNARD."

The plaintiffs here rested their case, and the defendant's counsel moved for a nonsuit, upon the grounds that under the contracts aforesaid, the defendant was not responsible to the plaintiffs for the damage proved by them, and also upon the ground that no cause of action had been established by the plaintiffs; but the court denied the motion, and the defendant's counsel duly excepted.

Daniel McMichael was called as a witness for the defendant, and testified as follows: "I am a barrister and counsellor at law, residing at Toronto, Canada; have been practicing law in Canada for twenty years; where there is a special contract for the transportation of property between the shipper and the carrier, by the law of Canada, the carrier is not liable upon his common law duty as a carrier, but only upon the special agreement, and the rights of the parties depend exclusively upon the special agreement; by the law of Canada, a carrier may contract to relieve himself from the consequences of his own negligence, gross or otherwise, and such a contract is valid; when, by a contract with a carrier, the shipper undertakes all risk of damage to the property while in course of con-

Keeney v. Grand Trunk Railway Company.

veyance, such a contract, by the law of Canada, will exonerate the carrier from liability from loss occasioned by his own neglect, gross or otherwise, and his own misconduct; the law of Canada, in these respects, differs somewhat from that of England, which is governed, to a great extent, by statutes which have no operation in Canada."

Other witnesses were also examined on the part of the defendant.

At the close of the testimony, the defendant's counsel requested the court to direct the jury to find a verdict for the defendant upon the following grounds:

1st. That by the law of the State of New York, the defendant was not liable under the provisions of the contracts under which the cattle were transported.

2d. Upon the ground that, by the law of Canada, the defendant is not liable, and that the rights of the parties are to be determined by that law.

3d. That the only ground of action is the delay of the cattle by the defendant; and that this delay was not affirmatively proved to be owing to the neglect or misconduct of the defendant.

4th. Upon the ground that the evidence is undisputed, that all freight received was sent in the order in which it was received; and that the cattle were forwarded as soon as they could be, according to said order.

The court refused so to direct the jury, and the defendant's counsel excepted.

The court, after reading the contracts to the jury, charged them that the parties had a right to anticipate that the cattle trains would be run in the manner usual in that particular business, and that there should be no affirmative prejudicial discrimination against this species of freight; and that if such discrimination was made, to the prejudice and damage of the plaintiffs, the defendant was liable.

To this charge the defendant's counsel duly excepted.

Keeney v. Grand Trunk Railway Company.

The court further charged the jury, that ordinarily carriers should forward freight in the order of time in which it is received, making no prejudicial discrimination; that the defendant had no right to give preference to freight about to become dutiable, for that reason only, as against the freight in question.

The defendant's counsel duly excepted to that part of this charge wherein the court charged that the defendant had no right to discriminate in favor of freight that was about to become dutiable.

The court further charged the jury, that the law of Canada controlled the rights of the parties as to acts done or to be done in Canada, but at the same time charged the jury that it was for the court to construe the contracts under which said cattle were shipped; that by the construction which the court gave to the contracts, the said defendant would not be liable for the delay in question if it had resulted from the misconduct or negligence of what is ordinarily known as the employees of the defendant, but that the defendant was liable for damage arising from its own negligence or misconduct, or the negligence or misconduct of the witness Barnard, which were not in contemplation of the parties to the contract, as he was the freight superintendent of that part of the road over which the cattle were shipped, and was the managing agent and representative of the corporation itself, and in this respect differed from an ordinary employee, so that his neglect and misconduct was the neglect and misconduct of the company itself.

The defendant's counsel excepted to that part of said charge, wherein the court charged the jury that it was for the court to construe said contracts; also, to that part of said charge in which the court charged the jury that the defendant was liable for the negligence and misconduct of the witness Barnard; also, to that part of said charge in which the court charged the jury that the witness

Keeney v. Grand Trunk Railway Company.

Barnard was the representative of the defendant, and in that respect differed from an ordinary employee, so that his neglect and misconduct was the neglect and misconduct of the company itself.

The court further charged the jury, that the defendant could not contract to exempt itself from the consequences of its own negligence, and the defendant's counsel excepted; also, that the negligence of Barnard was the negligence of the defendant, within the meaning of this rule, and the defendant's counsel excepted.

The counsel for the defendant then requested the court to charge the jury that the defendant was not liable for any error of judgment on the part of said Barnard, but only for his actual neglect or misconduct, but the court refused so to charge, and the defendant's counsel excepted.

The jury rendered a verdict for the plaintiffs for the sum of \$2325, for which sum, with the further sum of \$113.19 costs, judgment was entered in favor of the plaintiffs, and against the defendant.

E. C. Sprague, for the appellant.

I. The contracts under which the cattle were shipped were valid contracts, made upon good consideration, and binding upon both the parties thereto. The contracts grew out of the peculiar character of the cattle transportation business. It is customary for owners to go with, and look after the cattle; they are not delivered like other merchandise into the exclusive keeping of the carrier. The defendant would not ship the cattle except under such a contract. Passes were given, allowing men to go with the cattle, which were also good on passenger trains; these passes could not be procured by shippers unless they signed the contract. The pass and contract go together; no one could ship cattle without taking the pass to accompany them; the company gave a pass for every car, and would not ship on any other terms.

Keeney v. Grand Trunk Railway Company.

Adding to this evidence the fact that the transportation of cattle by railroad is a business involving peculiar hazards, which has sprung up within a few years, and which the defendant, as a common carrier, was under no obligations, as will be shown more fully hereafter, to undertake, and there seems no reason why the contract should not be upheld, and receive the same construction as any other lawful agreement. The position is fully sustained by authority, in this State and in England. See *Heineman v. Grand Trunk Railway Co.*, (31 *How. Pr.* 430,) where this precise contract is held to be valid, and the cases cited by the plaintiffs' counsel. (See also *French v. The Buffalo, N. Y. and Erie R. Co.*, 4 *Keyes*, 108; *Peek v. U. S. R. Co.*, 96 *Eng. Com. L.* 958, 986, and cases cited.)

II. The defendant cannot be made responsible in this action for any breach of duty as a common carrier, but only for a breach of the special contracts. 1. In England this would be so, because the general principle is there established that where the shipper, instead of relying upon the common law duty of the carrier, makes an express contract for the transportation of his property, he waives all claims against the carrier, by reason of his duty as such, and can only sue for a breach of his contract. (*Hamilton v. Grand Trunk R. Co.*, in the Court of Q. B., in Canada. *Pardington v. South Wales Railway Co.*, 1 *H. & N.* 392. *Stewart v. London and Northwestern Railway Co.*, 10 *L. P. R. U. S.* 302; and see note 1, *Am. Railway Cases*, 181, citing *Shaw v. York &c. R. Co.*, 6 *Eng. R. Cases*, 87; *Austin v. Manchester &c. R. Co.*, 5 *Eng. Law and Eq.* 329; *Same v. Same*, 11 *id.* 506; *Carr v. Lancashire &c. R. Co.*, 14 *id.* 340; *Chippendale v. Lancashire &c. R. Co.*, 7 *id.* 395; *Morville v. Great U. Co.*, 10 *id.* 366.) But it is conceded that as to general merchandise this is not the law in this State, it being here held that the common law duty remains, excepting so far as it is varied by the contract. (*Simmons v. Law*, 3 *Keyes*, 217, and cases cited.) 2. The rule making

Keeney v. Grand Trunk Railway Company.

the common carrier liable for all losses, except such as are the result of the act of God and the public enemies, has no application to the transportation of cattle in the manner testified to in this case, and the rights of the parties must depend upon the terms of the contract. The reason of the rule was that the owner of the goods did not accompany them, so that they were exposed to the frauds of the carrier. This reason has no application to cattle accompanied by their owners or their agents. Besides, the carriage of cattle is no part of the common law duty of a railroad company or other carrier, who simply holds himself out to the public as a common carrier of merchandise. The business is novel, involving peculiar and great risks, and the rights of the parties must depend entirely on the contract they make in each particular case; and besides, there is no actual delivery of the cattle to the carrier for transportation, as there is in the case of other merchandise. There can be no question that a railroad company might refuse to transport cattle at all, and the evidence is that the defendant never held itself out as a common carrier of cattle, but simply gave the use of its cars, servants and track, under special contracts, to persons transporting their own cattle, and retaining the possession and care of them, except so far as that possession and care were limited by the contract. (*Allen v. Sackrider*, 37 N. Y. 341, and cases cited. See particularly 1 Am. Railway Cases, 182, n. See also, *Illinois Central Railway v. Morrison*, 19 Ill. 136.)

III. By the contract in question, (being clause No. 1 of the instruments under which the cattle were transported,) the defendant is absolved from liability for delays occasioned by the neglect, misconduct or misjudgment of its employees. (*French v. The Buffalo, N. Y. and Erie R. Co.*, 4 Keyes, 108, and cases cited.) A careful examination of the opinion of the Supreme Court, in *Alexander v. Greene*, (3 Hill, 9,) and of the opinion of Justice Bronson in the same case, as reported in 7 Hill, 533, and of the case

Keeney v. Grand Trunk Railway Company.

of *French v. The Buffalo, N. Y. and Erie R. Co.*, will lead to the conclusion that where goods are taken "at the risk of the owners," the carrier is relieved from all responsibility for the want of ordinary care of his employees, and is only liable for their willful misconduct or gross negligence; that it is somewhat difficult to maintain even this extent of liability under such a clause, and that it should not be extended to other contracts, like those in the case at bar, which, when construed by the light afforded by the character of the business, were evidently intended to relieve the company from every degree of negligence, from which it might lawfully free itself. That such is the legal interpretation of these contracts, see the opinion of the court in *Heineman v. The Grand Trunk Railway Co.*, (31 *How. Pr.* 430,) and the argument of the defendant's counsel, page 445. At any rate, it can hardly be claimed that, under these contracts, the defendant can be responsible for anything less than "gross negligence," as defined by the court, in *French v. The Buffalo, N. Y. and Erie Railway Co.*

IV. Under the charge of the judge, the jury found a verdict for damages for delay occasioned by the acts of Barnard; and the verdict cannot be sustained under the charge of the court, unless the act of Barnard in sending the telegram of March 16th was an act not included within the operation of the contract limiting the carrier's liability. Now the sending of this telegram was not, under the circumstances detailed in his evidence, and the evidence of Squires, an act of misconduct or neglect on his part. At any rate, it was not an act of gross negligence, in the legal signification of the term, and was not an act for which the defendant is responsible under the contracts. Barnard was engaged in the performance of most delicate and responsible duties to all the shippers over the road. That duty was done skillfully and with diligence. Because, through unforeseen circumstances, the result was unfor-

Keeney v. Grand Trunk Railway Company.

fortunate, he should not be charged with negligence or misconduct.

V. The judge erred in charging the jury that the neglect of Barnard was the neglect of the defendant itself, so as to render it liable for his negligence, although it would not be liable for the negligence of its ordinary employees. This charge is based upon the idea that a common carrier may contract to protect itself from the consequences of the negligence of his servants, but not against his own; and that the defendant could not contract, at any rate did not contract, against the negligence of Barnard, because he was not an employee of the defendant, but was its representative in substantially the same manner as its board of directors. But, 1st. Barnard was, in every sense, an employee of the defendant. He was a subordinate under the control of a managing director, who was himself under the control of a board of directors. 2. It is enough that Barnard was an employee; his grade or rank is immaterial. The directors of a corporation are in no sense employed by it. They represent the stockholders who constitute the company. But whoever is employed by them is a servant of the company; the company may contract against the consequences of his negligence, and the contract affords no evidence of any distinction in the minds of the parties to it, between one class of employees and another. The rule forbidding a corporation to contract against its own negligence, only applies to cases where its affairs are conducted by a board of directors, or some body or person which represents the corporation, and is in no sense employed by it, and the neglect is the neglect of such board, body or person. (*See cases cited by Masten, J., in Heineman v. Grand Trunk Railway Co., 31 How. Pr. 454; Vanderbilt v. Richmond Turnpike Co., 2 Comst. 479; Dorr v. New Jersey Steam Navigation Company, 1 Kern. 485; Clark v. Rochester and Syr. R. R. Co., 14 N. Y. 510; Wells v. N. Y. Cent. R. R. Co., 24 N. Y. 180; Perkins v. The Same, (Id. 196-214; Bissell v. The Same,*

Keeney v. Grand Trunk Railway Company.

25 *id.* 442.) 3d. If a suit were brought by an employee of Barnard, in his department, against the defendant, for damages sustained by him, by Barnard's negligence, could the defendant be made liable upon the ground that he was the corporation, and not another employee? We insist he could not. (*See Warner v. Erie R. Co.*, 39 N. Y. 468.) 4th. The defendant might lawfully stipulate against liability for its own simple neglect. (*Lee v. Marsh*, 43 Barb. 102. *See cases cited by Masten, J., in Heineman v. Grand Trunk Railway Co.*, 31 How. Pr. 454.) Public policy only requires that the carrier should not be permitted to stipulate against his own bad faith, recklessness and gross negligence.

VI. The evidence is undisputed that all the freight received was sent in the order in which it was received, and that the plaintiffs' cattle were forwarded as soon as they could be, according to said order, and for this reason the court erred in not directing a verdict for the defendant. There is no evidence that as between cattle and freight upon which parties would lose twenty per cent, if detained beyond Saturday night, the cattle should have had preference. The evidence is directly to the contrary. The evidence is conclusive that the road was well equipped; that the delay was caused by an overwhelming quantity of freight, caused by the expiration of the reciprocity treaty; and that the cattle were sent forward in their order.

VII. The rights of the parties are to be determined by the laws of Canada, for the reason that the contract was made in Canada, it was substantially to be performed in Canada, and the breach complained of took place in Canada. While the parties might have had in view the laws of the State of New York, as to matters connected with the delivery of the property, there is no evidence that this extended to the transportation in Canada. For a citation of authorities upon this point, see *Jewell v. Wright*, 30 N. Y. 259; *Story's Conflict of Laws*, §§ 307, 314; *Pope v. Nicker-*

Keeney v. Grand Trunk Railway Company.

son, 3 *Story's C. C. Rep.* 465; 2 *Kent's Com.* 454, 458-460; *Coz v. U. S.*, 6 *Pet.* 172; *Hale v. N. J. Steam Nav. Co.*, 15 *Conn.* 539. And, besides, the liability of the defendant must depend upon the powers of its agents to bind the corporation, and those must be determined by the laws of Canada. (*See reasoning of Judge Story in Pope v. Nickerson*, 3 *Story's C. C. Rep.* 475, *et seq.*)

VIII. If the rights of the parties are to be determined by the laws of Canada, then it is clear upon the testimony of McMichael, that the defendant should have had a verdict. And the court erred in charging the jury that it was for the court to construe the contracts, and that by such construction the defendant was liable for damage arising from its own neglect. If by this charge the court designed to charge the jury that it had a right to construe said contracts without regard to the laws of Canada, it was wrong, because the interpretation of contracts falls within the doctrine of the *lex loci*, as well as anything else. (*See 2 Kent's Com.* 458, 459, and *Story's Conflict of Laws*, 272, a, §§ 274-278, and cases cited under point 6.) If, on the other hand, the court intended to say that construing the contracts by the law of Canada, the defendant was liable for its own neglect, it was equally wrong, by reason of the undisputed evidence of McMichael, that the defendant was absolved by the contracts, interpreted by Canadian law, from such liability.

IX. The court erred in charging the jury that if any discrimination were made against the plaintiff's freight to their prejudice, the defendant was liable for any damage resulting therefrom. 1. On the contrary, the defendant claims that the defendant is not so liable unless such discrimination amounts to neglect or misconduct. If, at the time, it is made in good faith, for the interests of the public and the customers of the road, the defendant should not be made responsible because unforeseen circumstances intervene and produce a damage to the plaintiff. If by

Keeney v. Grand Trunk Railway Company.

delaying a load of lumber a day, under circumstances indicating no possible injury, a valuable cargo of produce belonging to another person, can be saved from destruction, what is the duty of the carrier? Is he bound by an iron rule, forbidding him to make any discrimination under any circumstances? 2. The damages are not the natural result of the discrimination, but were occasioned by inevitable accident. 3. There was no evidence upon which to found the charge. The discrimination did not damage the plaintiffs, because the telegram which, it is alleged, caused the discrimination, did not have that effect, but simply restored the cattle to their lawful order; and prevented a preference to which they were not entitled. 4. The same objection exists to the charge that the defendant had no right to discriminate between dutiable and undutiable freight. Such an act is not evidence of negligence or misconduct. If a carrier, acting with due diligence and judgment, does the best he can for the benefit of his employers, as a whole, the fact that in consequence of unforeseen circumstances, amounting to the act of God or inevitable accident, damage occurs to a single party, will not make the carrier liable at any rate, except as an insurer. But the carrier is not an insurer as to delays, but is only liable for delays occurring through negligence or misconduct. 5. But whatever may be the liability, under such circumstances, of a common carrier, in the absence of a special contract, it is conceded to be the law, that the contracts in this case exempt the defendant from all liability as an insurer, and leave it responsible only for actual neglect and misconduct; the sending of the telegram by Barnard, to hold the stock, was not a willful wrong; it was not a gross neglect; it was not an act of negligence or misconduct in any legal or moral sense. It was not, under the circumstances, even an error of judgment, although it resulted unfortunately. It is only under its strict liability as a common carrier that the defendant

Keeney v. Grand Trunk Railway Company.

is liable for the consequences, and from that liability it is protected by the contract. 6. The cases holding that where the owner ships subject to all risks, he may still hold the carrier for losses by neglect or misconduct, are put upon the single ground that it cannot be supposed that the carrier intended to stipulate against his own misconduct or negligence; but it is entirely reasonable to suppose that he intended to guard himself against loss occurring by just such a cause as produced the damage in this case. It is covered by the language of the contract, and is within its intention and object. 7. Upon the same grounds there was error in the refusal of the court to charge that the defendant was not liable for any error of judgment on the part of Barnard.

L. W. & L. L. Thayer, for the respondents.

I. The defendant, as a common carrier, makes it a part of its business to transport cattle upon its road, and is equally liable for loss or damage, as in the transportation of other freight, and is equally an insurer of the property, except as against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent. (*Clarke v. Roch. and Syr. R. R. Co.*, 14 N. Y. 570.)

II. Assuming that the special agreement relied upon by the defendant is valid, it only relieved it from its liability as an insurer, or at most only from liability on account of those accidents, or contingencies, which were not caused by want of ordinary care and diligence on its part. 1. The rule is now very clearly established that contracts of this character should receive that construction which would be reasonable, and the parties to them will be presumed to intend. It is not enough for the defendant, that the language used in the agreement is doubtful or uncertain as to its meaning; the contract ought to be so explicit as to leave no reasonable doubt of its meaning or intent. (*Moore v. Evans*, 14 Barb. 524. *Scheiffelin v.*

Keeney v. Grand Trunk Railway Company.

Harvey, 6 John. 169. *Alexander v. Green*, 7 Hill, 533. *Wells v. The Steam Nav. Co.*, 4 Seld. 375. *French v. Buffalo, N. Y. and Erie R. Co.*, 4 Keyes, 108. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344.)

In *Scheffelin v. Harvey*, Judge Van Ness says: "It is undoubtedly true that the general operation of law may be controlled by the agreement of the parties; but such an agreement ought to be clear, and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both the parties." In the case of *Alexander v. Green*, Senator Bokee says: "If the permit had been intended to exempt the defendants from the consequences of their own negligence, which the law fixes upon them, such intention ought to have been clearly and unequivocally expressed, so as to leave no room for doubt or misconstruction." In *Wells v. The Steam Nav. Co.*, where the contract was the same as above, Justice Mason says: "The permit in this case contains the contract, and the question is whether it by its terms discharges the defendant from all liability, not amounting to fraud or the want of good faith. I cannot think that the expression contained in it, 'at the risk of the master and owners thereof,' was understood by the parties as a protection against all kinds of negligence. It would be an extraordinary contract which should, in express terms, give such a latitude in the performing of a hired service of so important a character as the one under consideration; and to permit a contract to have so unreasonable an effect as it would imply, the intentions of the parties should be so clearly and unequivocally expressed as to leave no room for doubt or misconstruction. In this contract nothing is said about negligence." In neither of the last two cases referred to were the actions against common carriers, and the defendants were only liable for negligence, and in both cases the plaintiffs recovered, notwithstanding the special agreement. (*French v. Buffalo, N. Y.*

Keeney v. Grand Trunk Railway Company.

and *Erie R. R. Co.*, 4 *Keyes*, 108, per *Woodruff, J.*) 2. But we insist that the contract in this case not only does not by its terms exempt the defendant from liability, but on the contrary, by the language employed, excludes any such inference. It is a well established rule in the construction of contracts, that the whole contract should be read together, and language employed in one part may be used to ascertain the meaning of the parties as to any other part. The first clause of the contract in question is as follows: "The owners of the within mentioned animals undertake all risk of loss, injury, damage, and other contingencies, in loading, unloading, conveyance and otherwise." Here is not a word said about negligence of any one, nor the least allusion to it. That cattle may accidentally be injured by loading, unloading or conveyance, without any gross negligence, or indeed without any negligence on the part of any one, is very apparent, and any such clause would not attract the notice of the shipper. Nor would he understand the word otherwise to extend the exemption, or to relieve the carrier from any duty or obligation to perform his part of the agreement. This clause does not profess to relate to anything but "contingencies." The third clause, however, uses very different language: "When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, misconduct or otherwise, on the part of the company, or their servants or any other person whomsoever," &c. One would hardly suppose that the language used in this clause was no broader, or comprehensive, than in the first, but it is gravely contended that such is the fact. 3. The construction of this contract as claimed by the defendant's counsel would exempt the defendant from any duty or obligation to perform it at all. If the cattle could be retained without food or water four days, they could four weeks. If with impunity it could have detained the cattle until

Keepey v. Grand Trunk Railway Company.

seven had died, it could until all had, and then by carrying the dead carcasses to Buffalo have claimed compensation on the ground that the contract had been performed. Not only, under that construction, is the company exempt for the fraud, gross negligence of its agents and servants, but for its own; as the learned counsel on the trial took special pains to prove by a learned barrister, that under the law of Canada such a contract would be legal. Of course, the parties understood and intended that the contract should have the effect that the law gives it. The question is, were the plaintiffs presumed to so understand it, or in other words, would it be a reasonable construction to say that the defendant was exempted, by the terms of the contract, from all duties or obligations as a carrier?

III. The special contract is wholly without consideration, and therefore invalid. The proof shows affirmatively that no deduction was made from the regular price for carrying the cattle, but the defendant charged and received the usual rates. Had the parties, the day before the cattle were shipped, entered into a written agreement embracing by its terms the same duties, obligations and liabilities which the law imposes upon the defendant as a common carrier; and had the plaintiffs, when the cattle were shipped, signed the same contract as they did, no one could pretend that it would have had any validity. It clearly would have been, for want of a consideration, a *nudum pactum*, and void. Yet there is no distinction in principle between such a case and this. The law itself creates the duties and obligations of a carrier, and the agreement does not add to them. In this State, at least, that fact is clearly recognized by the counsel for the different railways, as in all agreements to relieve themselves from the liabilities imposed by law on carriers, they insert a distinct consideration. And this position is supported by authority. In the case of *Bissell v. N. Y. Cent. R. R. Co.*, (25 N. Y. 450,) Judge Selden says: "If he, in

Keeney v. Grand Trunk Railway Company.

fact, paid as a passenger the full fare allowed by law, or the usual fare, if less than that allowed by law, without reduction on account of his engagement to assume such risk, in my opinion the engagement would be without consideration, and not binding upon him or his representatives." The same principle is clearly recognized by Justice Woodruff in the case referred to above.

IV. The injuries complained of were not caused by the negligence of the employers, or subordinate agents or servants of the defendant, but by the directions of its officers and general agent. Barnard, as general superintendent of the road from Goderich to Buffalo, had the control of all the trains. He says he had the general charge of running the trains from Buffalo to Goderich, that week. He directed the stopping of the trains containing the cattle, and under his direction they were detained. Can it be pretended that his acts were unauthorized by the defendant? There is not a particle of proof that they were. On the contrary, does not the law presume that a general agent acts with the authority of his principal? It certainly would be so if the principal were an individual, and I am at a loss to see why the same presumption should not equally exist when the principal is a corporation. The corporation in this case is in England. Out of nine or eleven directors, only three reside in Canada. As the defendant's directors did not meet in Canada, it could only act there through its officers or agents. Barnard was the agent who had the general control on that portion of the road, and must be deemed to act with authority. (*Munn v. Commission Co.*, 15 John. 44. *Jeffrey v. Bigelow*, 13 Wend. 518. *Anderson v. Coonley*, 21 id. 279.) In the case of *Munn v. Commission Co.*, the defendants were a corporation, and the court says: "It makes no difference that the defendants were a corporation; for it is settled that they may be bound by the acts of their agents, in the same manner as private individuals."

Keeney v. Grand Trunk Railway Company.

V. But this is not a case of mere negligence, or want of ordinary care and diligence on the part of the defendant, or its agents, but it is one of grossest misconduct, and dereliction of duty. It would be a most unreasonable construction of the special agreement, to hold that it exempts the defendant from liability for such acts. The parties certainly did not contemplate any such effect.

VI. Whether live freight had any preference over dead freight, by the regulations of the company, is of no importance. It is enough for this case that the cattle were received, shipped and started. It was then too late to talk about preferences. Besides, if dispatch No. 1, referred to in Barnard's evidence, were made a part of the case, it would show that the cattle were shipped by his direction; but the fact that they were shipped by the defendant's agent at Goderich is equally conclusive on the defendant. But this pretense that other freight had any preference, and that the cattle were detained for that reason, is a pure fiction and afterthought. Barnard's dispatch shows that they were detained for no such reason. It also excludes the pretext that the delay was occasioned on account of any blocking up of the road at Fort Erie. "Arrange," he says, "for as many specials to-morrow as will clear up the flour, grain, beef and pork, keeping back all stock, staves and lumber. There will no duty on stock. There is now a duty on staves, which will not be increased, and that on lumber is comparatively light." This shows that the sole object was to give a preference to freight which would become subject to duty on the expiration of the treaty, without reference to the time of its reception.

VII. The defendant had no right to give any such preference, to our prejudice. It certainly was too late to do so after it had received and shipped our cattle. There might have been some justification, at least humanity, in giving a preference to the cattle, after they had been put in a position where they could not be fed or watered; but no

Keeney v. Grand Trunk Railway Company.

pecuniary consideration, whether it went into Barnard's pocket, or any one else's, can justify such barbarity as this case discloses.

VIII. It is wholly immaterial what the laws of Canada are, so far as this case is concerned, as the contract was to be performed in this State. That the law of the place where the contract is to be performed, will govern in the construction of the contract, is too well settled, as well by adjudicated cases in England and America, as by elementary writers, to be open for discussion. (*Jewell v. Wright*, 27 How. 482, and cases cited by counsel and court.) The fact that in order to perform its agreement, the defendant transported the cattle through Canada, makes no difference. Suppose the carrier had lived at Detroit, (which is in a foreign State, so far as this question is concerned, as much as Canada,) and had made precisely the same contract. He might have sent the cattle by the Lake Shore, Grand Trunk, or Great Western roads. Would it depend upon what road they were sent, what law would govern the case? Had they been shipped by the State Line, and detained in Ohio or Pennsylvania, as they were at Brantford, could it be contended that we would have been bound by the law existing in either of those States? The gist of this action is the failure of the defendant to deliver the cattle at Buffalo within a reasonable time, as it had agreed, whereby we have been greatly damaged. We not only prove this, but prove that the defendant did not even use ordinary diligence to perform its agreement, but on the contrary was guilty of gross misconduct. We might have rested our case, upon proving that the cattle were shipped on the 15th, and did not arrive at Buffalo until the 19th, and that the usual time was from eighteen to twenty-two hours. Upon this proof we would have been entitled to recover. The defendant would at least be called upon to explain the reason why they were not delivered in the usual time.

Keeney v. Grand Trunk Railway Company.

Would it be a satisfactory explanation, to prove that the defendant did not try to do it?

Again, the injury was not caused by any act of the company or its agents, done in the performance of the agreement on its part, but in refusing to perform it. The injury was not caused in loading, unloading, or conveying, but in refusing to convey. Can it make any possible difference with the law applicable to this case, where the cattle were detained the longest time, whether on the other, or on this side of the line between Canada and the United States?

The only question in this case is as to the construction of the special contract. There is no question as to its validity, but as to its meaning. Upon that subject it speaks for itself, and it is clearly the duty of this court to construe it. On this subject the decisions of courts in Canada may be quoted as authority, the same as of the courts of Massachusetts, but with no greater force as law.

No errors were committed by the court upon the trial, and the judgment should be affirmed.

JOHNSON, J. The injury here complained of arose directly from the detention of the plaintiffs' cattle, on a side track of the railroad, between three and four days, at a place where they could neither be fed nor watered. Several head died, and the others were greatly reduced in flesh and strength.

It is quite difficult to see how this detention of the train on the side track, for this length of time, can be regarded and held to be an act of negligence, in any degree. It was the deliberate, intentional act of the division freight superintendent of the defendant's road. It is precisely of the character of the act of any other party who, after he has undertaken the performance of a job, deliberately stops, and refuses to proceed until he has performed another job, subsequently undertaken. To call this negligence, or a

Keeney v. Grand Trunk Railway Company.

failure to perform by reason of negligence, would be a misnomer, and an abuse of legal terms. It is simply a deliberate, intentional breach, in no way arising from want of care and attention during performance, but solely from the will of the defaulting party, claiming the right to perform whenever it should suit its interest or convenience to perform. The defendant refused to be bound, or to undertake upon the ordinary rules governing common carriers of such property, but insisted upon a special contract, which should constitute the rule and regulate both the rights and liabilities of the respective parties. This special contract was entered into, and must control according to its true intent and meaning. What the meaning is, the court must determine. The defendant received the animals upon its cars, under this contract, and by its terms undertook to forward them to Buffalo, to the consignee, "subject to their tariff, and the conditions expressed." The tariff was, confessedly, paid, and all that remained to be done was for the defendant to forward the stock, according to their contract. The stock was started the same day it was received upon the cars, and taken a part of the way to Buffalo; and had the cars containing the stock been permitted to go on with the train, would have reached the place of destination the same night. Instead of this, the cars containing this property were, by a positive and peremptory order, when within sixty or seventy miles of the place of destination, detached from the train and placed upon a side track, where they were kept three or four days, and where several of the animals perished from hunger and the inclemency of the season, and others were greatly reduced in flesh, weakened, and otherwise injured. They were detained at a place where they could neither be fed nor watered, and where they could not with any safety be unloaded and taken out of the defendant's custody.

The only question in the case, in my judgment, is

Keeney v. Grand Trunk Railway Company.

whether, according to the "conditions expressed" in the special undertaking, the defendant had the legal right to suspend the performance of the undertaking which they had commenced, in this manner, and for this length of time, without rendering itself liable to the plaintiffs for damages occasioned by such suspension. I am clearly of the opinion that it had not. Whatever may be said of these conditions, it certainly cannot be affirmed that they extend to a case of damage arising from the deliberate and intentional act of the defendant, or its agents, in suspending performance after it had been commenced, and refusing to perform, or to allow performance, until after the property, or a portion thereof, had been destroyed, and other undertakings could be performed. In other words, the defendant did not reserve to itself the right to perform, or not, as it might afterwards elect, or to perform only as it might suit its interest, convenience or pleasure. Such an arrangement, had this been one of that character, could hardly be called a contract, as it would lack the essential ingredient of mutuality of obligation. The defendant here did undertake to forward the property to a particular place, but by the limitation in the second condition, it did not undertake to forward it "by any particular train, or at any specified hour." Nor did it undertake to become "responsible for the delivery of the animals within any certain time, or for any particular market." But to hold that this limitation of duty and liability thus expressed, gave to the defendant the right to perform, or not, as it might choose, or to perform only when it might be for its interest, convenience or pleasure to do so, and suspend performance when once commenced, until all the animals should have perished and become worthless to the owners, would be simply monstrous. No court, in my opinion, can be found to give, or tolerate, such an interpretation of the defendant's undertaking. It must have a reasonable interpretation.

Keeney v. Grand Trunk Railway Company.

Where the object of a contract is to relieve a party undertaking to perform, from some of the obligations and liabilities which the law imposes upon him in the absence of any express stipulation, it is to be construed in reference to that object and purpose. General expressions exempting a party from liability on account of injuries to property committed to his charge, should never be held to apply to injuries arising from the wrongful acts of the party undertaking, unless it is expressly so stipulated. It cannot be supposed that the owner of property intends to give a party to whom he intrusts, for the time being, its care and custody, license to injure or destroy it wantonly, with impunity, unless it is so expressly "nominated in the bond" or undertaking. It is quite incredible that the law holds differently, either in Canada or elsewhere in civilized countries. Courts never construe contracts so as to favor criminal acts, or intentional misconduct, unless constrained to do so by the clearest and most apt terms of the instrument.

If I am right in supposing that this is not a case of an injury arising from negligence in any degree, but a case of an injury arising from a deliberate and intentional refusal to perform, for the time being, then it is quite clear that the act of Barnard, the superintendent, was the act of the defendant, and the defendant is liable. In every case where a party who has engaged to perform certain labor or services, employs others to perform on his account, and such others, after commencing to perform, refuse to go on, or to allow the work to proceed, such refusal is the refusal of their employer, and if it amounts to a violation of the contract, it is the breach of the employer. Their misconduct, in such a case, is his misconduct, so far as it operates upon the contract and causes non-performance.

The order of the superintendent, who had charge of the freight business on that portion of the road over which

Keeney v. Grand Trunk Railway Company.

the property in question was to be forwarded, was positive, to keep "back all stock, staves and lumber," and the reason is assigned in the order. "There will be no duty on stock." The reciprocity treaty was about to expire, and other property on hand to be transported would become subject to the payment of a duty to our government if not forwarded forthwith. Therefore this agent of the defendant took it upon himself to discriminate in favor of the owners of such property, to the prejudice of the plaintiffs. Their property which was then on its passage was stopped, deliberately, upon this consideration, and the preference given to other property, contrary to the ordinary course of business. The obvious purpose and intention of the agent was to favor the owners of property about to become dutiable, and deprive our government of the benefit of duties it would otherwise be entitled to receive. Upon the plainest principles, it can make no manner of difference, whether this superintendent was authorized by the defendant to make this order, or not. He was its agent or employee to carry out and perform its contracts, and if he has deliberately broken them, instead of performing, the defendant must answer for such breach. It was not casual or accidental, but was the direct effect of design and plan. There is nothing about it partaking of the character of negligent conduct, in the legal sense of that term. The design of postponing performance with the plaintiffs was carried out, to their injury, and the question is whether the act is authorized by the "conditions expressed." I have endeavored to show that it is not, and am clearly of the opinion that the defendant is liable for the act of its agent, Barnard, in arresting the performance of the contract, whatever may have been his authority, so far as his act or order had the effect to prevent performance, and thus create a breach of such contract. It is always incumbent upon every party to a contract to see that it is performed, and if not, to respond

Keeney v. Grand Trunk Railway Company.

in damages for the loss occasioned by the non-performance; and there is no exemption from this rule in favor of corporations.

The position of the defendant is, in my view, the same precisely that it would have been, had the engineer and conductor, and all the other hands upon the train, willfully and intentionally deserted it, and refused to proceed any further, for the same length of time. In such a case, the question of the power of these persons to bind the corporation does not arise. If the corporation, by such agents, or by some other means, does not perform its engagements, it is bound to respond in damages for the breach, to the injured party, and must look for its redress to the agents who have failed to perform their duty.

When it is once settled that the contract was not performed by the defendant according to the true meaning and intention thereof, all other questions, except as to the proper measure of damages, become wholly immaterial.

The judgment should therefore be affirmed.

TALCOTT, J. It is settled, by the decisions in this State, that a carrier, even a railway company, may, by express contract, exempt itself from liability for damages resulting from any degree of negligence on the part of its servants, agents and employees. But it seems to be equally well settled, and to a great extent by the same authorities, that a contract, to have such effect, must be so clear and explicit in its terms as to leave no doubt that such was the intention of the parties. (*The New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. U. S. 344. *Wells and Tucker v. The Steam Nav. Co.*, 4 Seld. 375. *French v. The Buffalo, N. Y. and Erie R. Co.*, 4 Keyes, 108.)

The stipulation relied upon by the defendant to show its exemption from liability, in the present case, is as follows:

"1. The owners of the within mentioned animals, un-

Keeney v. Grand Trunk Railway Company.

dertake all risk of loss, injury or damage, and *other contingencies*, in loading, unloading, conveyance and otherwise."

I am unable to distinguish the legal effect of the language here used, from the expression, "at the risk of the master and owners," or "at owner's risk." I do not think the use of the word "all" has made the stipulation any more extensive than it would otherwise have been. Unless the word "risk" be in some manner qualified, it must embrace all those circumstances which fall within the term "risk." It seems to be well settled, and by the court of last resort, that the expression "at the owner's risk," or any equivalent expression, in such a contract, does not cover the *gross* negligence of the employees of the carrier, so as to exempt the principal from liability for damage caused by it. (*Scheffelin v. Harvey*, 6 John. 175. *Alexander v. Greene*, 7 Hill, 533. *Wells and Tucker v. The Steam Nav. Co.*, 4 Seld. 375. *Perkins v. The New York Cent. R. R. Co.*, 24 N. Y. 196, 206. *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. U. S. 344. *Smith v. The N. Y. Cent. R. R. Co.*, 24 N. Y. 222, 234, 235. *French v. The Buff. N. Y. and Erie R. Co.*, 4 Keyes, 108.)

The contract in question in this case presents two circumstances which much aid in thus limiting its construction:

First. All the risk embraced in it is confined to "contingencies," a word which, though capable of a much larger signification, would ordinarily be understood as referring only to accidents, or casualties, and as designed only, in such a case as this, to exempt the carrier from his common law liability as insurer against accidents, unintended by negligence.

Second. The third stipulation of the contract, applicable to persons in charge of animals, and to whom free passes are given, expressly and in terms exempts the company from responsibility for any negligence, default or misconduct of its servants. It is scarcely credible that the parties

Keeney v. Grand Trunk Railway Company.

who made this contract, intended to express the same idea, as to the exemption of the company from liability, by the language used in the first, as by that used in the third provision.

There was evidence given in the case tending to show that the injury to some of the cattle of the plaintiffs, and the death of others, had resulted from the gross negligence, and even the absolute misconduct of the employees of the defendant.

It is not easy to see how, if the term risk does not embrace the *gross* negligence of the carrier, it can be held to cover *any degree* of such negligence. Yet this distinction seems to have been insisted on in the cases referred to. If it is to be held that although the word "risk" does not cover the gross negligence of the carrier's servants, in such a contract, yet it does cover the slight, or any less degree of negligence, than what is termed "gross," there is a difficulty in upholding this verdict on the ground of negligence, namely, that it does not appear that the jury had decided upon the degree of negligence. The learned justice at *nisi prius* appears to have adopted the view of the defendant's counsel, that the contract, by its terms, did exempt the defendant from responsibility for any degree of negligence on the part of those who, in the language of the charge, are "ordinarily known as the employees of the defendant." But he further instructed the jury, in substance, that the defendant could not make a valid contract to exempt itself from liability for *its own* negligence, of whatever degree, and that the negligence of Barnard, the local superintendent of the defendant, was *its own* negligence, within the meaning of the instruction. To this I am unable to assent. To apply, with any degree of certainty, to a corporation, the two rules referred to by the learned justice, 1st. That the carrier cannot, by contract, exempt himself from liability for his own negligence; and, 2d. That such carrier may contract for exemption from

Keeney v. Grand Trunk Railway Company.

liability for the negligence of his servants and agents, is somewhat difficult, since a corporation can only act through its agents. The difficulty is in drawing the line between those agents whose negligence is to be deemed the negligence of the corporation, and those whose negligence is to be regarded as the negligence of mere agents, and covered by a contract such as the one in question is claimed by the defendant to be. In this case, it would seem that the discrimination was attempted to be made by confining the exemption to the negligence of those "ordinarily known as employees." I do not see that this presents any certain or safe rule, and am not able to say that there is a class of agents of railway companies "ordinarily known as employees," to be distinguished from another class not so known; nor do I know any means by which, if there be any such distinction, it is to be determined, as matter of law, whether a particular individual agent belongs to the one or the other class.

If it can be said that any agent who has the power, or is expected or accustomed to exercise any discretion, within the purview of his duties, is an agent whose negligence is that of the railway company itself, it will be found, I apprehend, that all its agents, down to engineers, conductors and track-masters, are expected and accustomed to exercise more or less discretion within the scope of their special employment and duties. We have not been referred to any adjudged case which seems to be an intelligible and direct authority upon this point, except the case of *Heineman* against this same defendant, in the Superior Court of Buffalo, and decided by a divided court, (31 *How. Pr.* 454.) The suggestion of the court in that case is, that the negligence, against liability for which it is unlawful for the corporation to contract, is confined to that of the board of directors. It seems to me, if the rule is to have any force, and it appears to be well established, the negligence, against liability for which a railway corpora-

Keeney v. Grand Trunk Railway Company.

tion is not permitted to contract, must be confined to that of the board of directors, or, at all events, cannot be extended beyond that of those managing officers who make the general regulations for the running of the trains and the transaction of the business of the road, for the government of others, binding upon all the subordinate agents.

It appears to me, therefore, that this verdict cannot be sustained under the charge of the court on the question of negligence. I am, however, inclined to the opinion that the verdict may be sustained upon the grounds stated in the accompanying opinion of my associate, Justice JOHNSON, to wit, that the question of negligence was wholly immaterial, inasmuch as the case, as admitted by the defendant, showed a willful abandonment of, and refusal to perform, the contract on its part, through its agents; and therefore the instruction of the court, as to the right of the defendant to contract to relieve itself from responsibility for the negligence of its agents, could have produced no injury to the defendant, since a willful abandonment of, and refusal to perform, its contract, is something more than negligence, and something which it cannot be pretended was authorized by the stipulations annexed to the the contract.

Upon this ground, I concur in the affirmance of the judgment.

MULLIN, P. J., also concurred.

Judgment affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 6, 1870. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

ABRAHAM COX vs. SARAH JAMES.

M. and wife, being the owners of a piece of land, laid out the same into village lots, and made and filed a map thereof, which embraced an alley, designated thereon as "South alley." They subsequently conveyed three of such lots, by their numbers as described on such map, to the plaintiff, by deeds bounding such lots "*along the north line of South alley,*" and described them as lots known and distinguished on a map of village lots owned by the grantors, by the numbers mentioned in the deeds, with the appurtenances. *Held* that neither the grantors, nor those deriving title from them, to the land described as an alley, could inclose it, and exclude the plaintiff, and his heirs and assigns, from using the alley as a way.

Held, also, that the reference, in the conveyances, to the map on which the lots conveyed were described, introduced the map into the deeds, and made it a parcel of the deeds, and the grantees were entitled to the use of the alley, along which their lots were described as lying, *as appurtenant to the grants.*

APPEAL by the defendant from a judgment entered upon the report of a referee.

The action was brought to establish the right of the plaintiff to the use of an alley on the south side of his lot, in the village of Saratoga Springs, which lot was conveyed to the plaintiff by Amos S. Maxwell and wife, by deed dated June 2, 1855. It was claimed by the plaintiff that the description of the premises conveyed by his deed conveyed the land to the center of South alley, (the alley in question;) or if not, that the land immediately south of said lot, being laid out, on a map referred to in the deed, as an alley sixteen feet in width, the plaintiff derived the right, from the deed, as against the grantors therein and their subsequent grantees, to have the space so marked on the map as an *alley* always kept open as such. The defendant claimed the whole of the land embraced in the alley as absolutely her own, by virtue of a *subsequent conveyance* from Maxwell's wife to her; and she had fenced it in with her own lot, and wholly excluded the plaintiff therefrom.

The action was referred to a referee, who found the fol-

lowing facts: The plaintiff is, and since June, 1855, has been, the owner and in possession of three lots in the village of Saratoga Springs. The defendant is, and since July, 1864, has been, the owner and in possession of two lots in the same village. The plaintiff's lots are known as Nos. 48, 49 and 50; the defendant's lots as 115 and 116. The plaintiff's lots lie adjoining each other, and together form one parcel of land, bounded on the east by Cottage street, and on the west by Regent street, both being public streets. The defendant's lots lie adjoining each other, and together form one parcel, and are bounded in like manner, by the same streets. Separating the plaintiff's lots from said lots of the defendant, is a strip of land sixteen feet in width, extending from Regent to Cottage street, and is described as "South alley" in the deeds and maps herein after mentioned. The plaintiff derives title from Louisa A. Maxwell, who, at the time of and prior to her conveyances to the plaintiff, was the owner of lots 48, 49 and 50, and of South alley. Mrs. Maxwell, in 1854, and before her conveyances to the plaintiff, caused a survey to be made of said lots and "alley," and of other lots and of streets in the vicinity, and a map thereof to be made and filed with the clerk of Saratoga county. Upon this map the plaintiff's lots are designated by said numbers, and the strip of land aforesaid as "South alley." The defendant's lots are also designated thereon by the numbers thereof above given. Upon this map the plaintiff's lots abut upon the northerly side of South alley, and the defendant's lots upon the southerly side thereof. It does not appear that Mrs. Maxwell was the original source of the defendant's title to her lots. Mrs. Maxwell, by the deeds executed and acknowledged by herself and Amos S. Maxwell, her husband, in July, 1855, conveyed lots 48, 49 and 50 to the plaintiff. The material part of the description in the deed of lot 50 is as follows: "All that

Cox v. James.

certain lot situate in the village of Saratoga Springs, known and distinguished as lot No. 50, on a map of village lots, owned by the parties of the first part, made and surveyed by H. Scofield, civil engineer, in 1854, which said lot is bounded and described as follows." Here follows a particular description of each side, referring to South alley as follows: "Thence to a stake in north line of South alley; thence along the line of South alley." The description in deeds of lots 48 and 49 contains the like particulars as to each side, and the like reference to the map and *north line of South alley*. Justice Colwell was the defendant's grantor, of one of the lots. This deed to the defendant does not refer to the map nor number of the lot. The boundary is described as running to a lane called South alley, and thence along said alley. The defendant's other deed is from John H. White and others, and the boundary is described as running to the lane called South alley, and thence along said alley. The plaintiff's deeds were recorded in the Saratoga county clerk's office in 1855. In 1864, Louisa A. Maxwell, by a quit-claim deed, conveyed South alley to the defendant, describing it as South alley. At the date of the plaintiff's deeds, South alley was in an unimproved condition. It has never been used either as a public or private way. The plaintiff, shortly after his purchase, inclosed his lots and built a fence along the northerly line of South alley. The alley and the lots now owned by the defendant were then uninclosed. No fence was ever built along the south line of South alley. The defendant, in 1864, after the conveyance to her as aforesaid, of South alley, built a fence along the north line of South alley, as close to the plaintiff's fence, built as aforesaid, and then standing on said line, as the same could be made, and inclosed South alley in her lots, and, against the protest of the plaintiff, has since excluded him from any use or enjoyment of South alley.

Cox v. James.

The referee's conclusions of law were as follows :

The plaintiff's deeds give him no title to the land to center of South alley, or to any part thereof. Louisa A. Maxwell, by the deeds to the plaintiff above recited, conveyed to him as incident to the grants of lots to him, a right to use South alley as a private way.

The defendant's title to South alley is subject to the right of the plaintiff to use it as a private way.

The defendant had no right to exclude the plaintiff from the use of South alley by the inclosure thereof in her lots.

The plaintiff is entitled to judgment against the defendant for six cents damages, and that the defendant remove the fences erected by her across the easterly and westerly ends of South alley, and that she be perpetually enjoined from so inclosing or otherwise obstructing the same, so as to prevent the plaintiff, his heirs and assigns, from the free use thereof as a private way. And he directed judgment accordingly, with costs against the defendant.

The defendant excepted to the referee's report and findings of fact and conclusions of law, and appealed from the judgment.

E. D. James, for the appellant.

I. In order that Louisa A. Maxwell, had she been the real grantor in the deeds to the plaintiff, might dedicate South alley to the use of the plaintiff, as a private way, she must then have owned it, and there is no evidence that Louisa A. Maxwell owned South alley at any time prior to the day of conveyance to the defendant; and wherein the referee found that she did so own it his finding was erroneous, as totally unsupported by evidence, and the exception thereto was well taken.

II. The exception to finding of fact number four is well taken. The deeds to the plaintiff do not of themselves furnish any evidence that Louisa A. Maxwell was, at the time of executing them, owner of the premises conveyed, or

Cox v. James.

had any interest in them beyond her inchoate right of dower. It was necessary for her, in order that her dower interest might be released, that she should join in the deeds, and she does so in the usual form, describing herself as wife, thus designating the purpose, and acknowledges as wife, and not as owner. As owner, the simple form of acknowledgement was only proper, but if she would release her dower she must do so upon private examination. There is no evidence in the case supporting the finding of the referee in this respect, and it is error. *De non apparentibus, et non existentibus eadem est ratio.*

If she had no interest beyond her inchoate dower in lots 48, 49 and 50, even though she joined in the warranty, and owned the lot South alley, and there had been no words of limitation of boundary to its north line, the deed could not be construed as conveying an easement, for the reason that her release of dower could only be coextensive with the estate conveyed by her husband, and her warranty would be void.

III. There is no evidence in the case that Louisa A. Maxwell ever caused any survey or maps to be made of her lands, and all the evidence of making any map is contained in the testimony of A. S. Maxwell, and the reference made to it in the deeds. It nowhere appears that Louisa Maxwell ever saw this map until after the conveyance to the defendant, or that she knew of its existence, except as reference is made to it in the deeds, and then it is referred to as a map of lands of Amos S. and Louisa, whether in severalty or jointly; whether of lands which they owned as tenants in common, or of lands owned separately, does not appear. If separately, and Louisa and Amos owned lots 48, 49 and 50, as tenants in common, or jointly as husband and wife, a conveyance by them of said lots would not, under any circumstances, work a dedication of lot South alley.

IV. The language of the deeds to the plaintiff limited

Cox v. James.

his title to the north bounds of lot South alley. The words of description and boundary expressly excluded any grant to the center of South alley, or any right except such as were appurtenant to the thing granted. A grant of this description does not carry any interest in land beyond the points indicated in the description. (*Child et al. v. Starr et al.*, 4 Hill, 369. *Jackson v. Hathaway*, 15 John. 454; 20 Wend. 149. *Anderson v. James*, 4 Rob. 35.) As this lot had never been used at all, it of course was not an appurtenant.

V. The deeds having excluded the lot South alley, by bounding lots 48, 49 and 50, by monuments in the north line of said alley, no easement is created therein in favor of the plaintiff. The plaintiff could acquire no right, except under his grant, conceding, for this argument, that Louisa A. Maxwell owned all the lands in question at the time of the conveyances to Cox. The right of way could only be acquired by grant of the owner, or from necessity. (2 *Kent's Com.* 419.) Prescription supposes a grant, and right, from "necessity," grows out of construction of the grant. The public may acquire a right of way otherwise than from grant, and may, among these ways, by what is termed dedication. But dedication assumes a grant to the public, or in other words, estops the owner from saying he has not granted. All the cases, when sifted, put the creation of a right of way directly upon the grant. It may be, and is frequently, called dedication, still the creation is found in the deed. When lands are bounded upon or by public streets, or are conveyed by map numbers abutting upon streets, the title is held to extend to the center of the street, by construction of the deed that such was the intention.

Under our statutes an interest in lands can only be conveyed, from one person to another, by deed. The right of way at bar is an easement, and an interest in lands, and can only be conveyed or created by deed, (the question of

Cox v. James.

operation of law not arising here.) With the exception of cases where a dedication to the public is made and upheld by way of estoppel, there is no dedication or other way to convey voluntarily an easement from one person to another but by deed. If A. conveys to B., by map or otherwise, so as to indicate that the intention is that B. shall have an easement in the streets referred to in the deed, or on the map, then the deed grants the easement; but if the deed, by its terms, excludes the easement, then none can exist in favor of the grantee.

Although the map is referred to in the case at bar, and the lots 48, 49 and 50, do in fact abut upon South alley, the deed assumes to convey only that part within the lines indicating the extent of the lot, and by express words excludes the alley, for the south line of the lots is only to extend to monumental points in the north line of the alley.

VI. There had never been any acceptance of the *locus in quo*, or use of it in any form, so there could be no estoppel, and consequently no dedication. And even if Mrs. Maxwell had some time thought to dedicate it, she might revoke. (*Holdane v. Trustees of Cold Spring*, 21 N. Y. 474.)

VII. The easement or right of way to the plaintiff is not an incident to the grant, and the facts, as found by the referee, do not justify such a conclusion of law. The proof is undisputed that the premises of the plaintiff were and are surrounded on three sides by public highways, and he can pass off his own lands at every point unobstructedly on the northeast and west sides; and the plaintiff admitted the absence of necessity by proposing to divide the lands. Where is the necessity which requires such a construction of the deed as that Louisa Maxwell intended to convey this right of way as an incident. A construction of a deed which will make it convey more than is expressed upon the face, as incident to the grant, is justified only by the assumption that the grantor did not intend to convey that which the grantee could not enjoy, but did intend to

Cox v. James.

convey the easement in order that the subject conveyed might be enjoyed. Such construction always arises in necessity. If an easement be conveyed, nothing passes as incident to it but what is necessary to its enjoyment, and as an easement is but a limited interest in the land, incidents more naturally attach to it than when the fee is greater. (*Lyman v. Arnold*, 5 *Mason*, 195.) The necessity must be shown, or it cannot be said the parties intended more than they said in the deed. In this case it is shown there was no necessity, and the right of way, therefore, cannot be taken as incident to the grant. (*Badeau v. Mead*, 14 *Barb.* 336. *Willard on Real Estate*, 194, 195.)

VIII. The referee finds as a conclusion of law, "that the plaintiff's deeds give him no title to the land to the center of South alley, or to any part thereof." This conclusion of law is inconsistent with the idea that the plaintiff has a right to use South alley as a private way, for this is a title to some part of it; and as the way by necessity was not chosen by the plaintiff, but if at all was pointed out by his grantors, then they take directly by the grant. (*See Willard on Real Estate, supra.*)

IX. The objections to proof of title and possession by parol, are well taken. The evidence of Maxwell was incompetent to prove the conveyance to Freeman. And the objection to the question whether South alley was ever opened from Cottage street, east, is also well taken.

X. The *locus in quo* cannot be said to have been conveyed as an incident of the character of appurtenant, for it had never been used as such—or at all in connection with any of the lots owned by the plaintiff. (*Huttemeier v. Albro*, 18 *N. Y.* 50.) Finally, it is insisted the judgment should be reversed, the finding of the referee being contrary to the law and the facts, unless the calling a piece of land by a particular name gives it a particular character, and the calling a lot of land South alley, *per se*, converts

Cox v. James.

it into a private way, or the calling a heathen after one of the apostles converts him into a Christian.

A. Pond, for the respondent.

I. The deeds from Maxwell and wife conveyed to the plaintiff the land to the center of South alley, as described and laid out on the map referred to in the deeds. 1. It is well settled that a deed, under the circumstances existing here, conveying a lot by its number, simply, and referring to a map upon which the lot is laid out, carries the grantee to the center of the street on which it appears to be bounded, by the map. The cases to this point are numerous and decisive. (*Perrin v. The N. Y. Cent. R. R. Co.*, 36 N. Y. 120. *Bissell v. Same*, 23 *id.* 61. *Varick v. Smith*, 9 *Paige*, 547.) And this is so, although such street has never been adopted or accepted by the public authorities. The grantor is held to have dedicated such land for the purposes indicated on the map, and the grantee in the deed takes the land by grant. (*Id.* *Holdane v. Cold Spring*, 21 N. Y. 474. *Parker v. Smith*, 17 *Mass.* 413.) 2. So also where a lot is conveyed, and the only description in the deed is by courses and distances, and that portion of the side of the lot conveyed which abuts on the street, is expressly limited to the line of the street adjoining the lot, then and in that case the parcel conveyed excludes the whole of the street and extends only to the line of the street adjoining the lot. (*Anderson v. James*, 4 *Rob.* 35. *Child v. Starr*, 4 *Hill*, 369. *S. C.*, 20 *Wend.* 149.) 3. But where the only description is by courses and distances, and they in fact bring the lot up to a street, although the street be not mentioned in the deed, then, and in such case, it is also held that the title of the grantee extends to the center of the street. (*Sizer v. Devereux*, 16 *Barb.* 160.) 4. But it is attempted by the defendant to apply the principle to this case which would apply to it if the deeds to the plaintiff did not refer to the number of the lot at all, nor to the

Cox v. James.

map, but merely restricted the description to the north line of the alley. But this would be erroneous, and I insist the fair construction is to carry the plaintiff's lots to the center of the alley; because the deeds have referred to the lots by their numbers, and as laid out on the map. The description which follows, only describes the lines of the lot just as they appear on the map, in fact. It is but amplifying the description which the deed would in fact contain, if the latter part were entirely omitted. The lines on the map would then show this lot distinct from the alley by the north line of the alley which separates the latter from the lot. Now the reference to the map makes it a part of the deed, and the deed is the same as though the map was incorporated in it. They are to be taken together, and both constitute the description of the land conveyed. (*Smyle v. Hastings*, 22 N. Y. 222. *Sizer v. Devereux*, 16 Barb. 160. *Herring v. Fisher*, 1 Sandf. 344.) This being so, the deeds to the plaintiff in this case should be construed the same as though the latter part of the description was not contained in them, and this would carry the plaintiff to the center of the alley. It is a question of intention, and it is not to be presumed that the grantors in the plaintiff's deeds designed to retain the title in those streets and alleys which were laid down upon the map. Of course, if nothing but the latter part of the description had been inserted, without reference to the number of the lot and the map, the defendant's construction might prevail; and it is equally certain that if the latter part were left out and the number of the lot and map were referred to, the construction here insisted on would prevail. Now the question here is, what is the construction where both are inserted? I insist it is still to carry the plaintiff's title to the center of the alley in question. If there are conflicting descriptions inserted, and it is left doubtful on the face of the deed whether the plaintiff goes to the center of the alley or not, the law will construe the deed

Cox v. James.

most strongly against the grantors, and that will lead to the adoption of the construction for which I contend. (*Marsh v. Burt*, 34 *Verm.* 289. *And see Lozier v. N. Y. Cent. R. R.* 42 *Barb.* 468.) No case has fallen under my observation where a deed containing a description like the one contained in the deeds to the plaintiff has been decided to carry the grantees only to the exterior line of the street, and not to the center thereof. And I insist that the current of authority and tendency of the decisions now is to construe a deed as extending to the center of a highway, street, lane, alley or stream on which a lot therein conveyed is bounded. And such ought to be the construction, as it is utterly absurd to suppose that either party to the deed, under such circumstances, intended that the grantor should retain a legal title to a piece or small strip of land, which, in any event, has been dedicated as a street or alley, and which, therefore, can never be of any practical use to him or his grantees. Hence the principle is well established, that to prevent the deed from extending to the center of the street or alley, under such circumstances, the grantor must express such intent in clear terms, or the legal presumption that it does so extend will prevail. If he puts in his deed, as the plaintiff's grantors did, a description which operates both to exclude and include the street or alley, it is no such clear expression of intent as to prevent the deed extending to the center, and I claim the plaintiff's deeds so extend.

II. But if the title of the plaintiff is held not to extend to the center of the alley, as laid down on the map, still the defendant's grantors having conveyed to the plaintiff by the map, by which an alley is laid out on the south side of his lots, the land covered by the alley was thereby dedicated by the Maxwells as and for an alley for the convenience of those lots adjoining on both sides of it, and neither they nor their grantees have any right to shut it up and to exclude the plaintiff from using it. It became an appurte-

Cox v. James.

nant to the land conveyed, and the plaintiff has the right to have it kept open and the defendant's fence removed therefrom. (*Badeau v. Mead*, 14 Barb. 328.) Look at the description in the conveyance in this case, and compare it with the plaintiff's deeds.

In this case the court remark, (*p. 336, Strong, J., giving the opinion* :) "I consider it to be well settled, that where the grantor bounds the lands which he conveys, by roads, whether existing or to be made, over lands retained by him, he conveys to the purchaser, as incident to the grant, a right to use such roads as described, when they adjoin, and if necessary, out to the common highway. Such right becomes appurtenant to the land conveyed."

So too, in *Smyles v. Hastings*, (22 N. Y. 222,) where a similar question arose, Wright, J., remarked: "I am of the opinion that William Atkinson, by the conveyance to him of lot No. 8, of the subdivision on the partition between the proprietors of the tract, became entitled, as a part of his grant, to a right of way over the road laid down on the map, as an easement appurtenant to his lot; and this without regard to the question of necessity. By the subdivision and allotment of the tract by the proprietors, a right of way over this road was annexed as an easement to the lots bounded upon it, and the easement passed to Atkinson by the conveyance to him of lot No. 8. The proprietors marked out this road running through the tract from east to west, bounded lots upon it, and then executed conveyances of such lots. In fact and in effect, the map on which the road was laid out was part and parcel of such conveyances; and without resort to it, the lands described in them could not be located."

The judgment, therefore, directed by the referee was right to the extent to which it went; and it should have recognized the right of the plaintiff to the land to the center of the alley. But the error of the referee in omitting to give such a judgment, is one of which the defendant

Cox v. James.

has no right to complain, and the judgment entered upon the report of the referee should, therefore, be affirmed, with costs.

By the Court, ROSEKRANS, J. There can be no question as to the correctness of the referee's findings of facts and conclusions of law. The plaintiff's grantors are the original owners of the lots conveyed to the plaintiff, and of the strip adjoining those lots on the south, called South alley. Before the conveyance to the plaintiff, they had made a map of the lots and alley, and filed it, and the conveyances bounded all the lots "*along the north line of South alley,*" and conveyed them as lots known and distinguished on a map of village lots, owned by the grantors, by their numbers, with the appurtenances; and the simple question is whether, under such a conveyance, the grantor, or those deriving title from him to the land described as an alley, can inclose it and exclude the plaintiff, and his heirs and assigns, from using the alley as a way.

In the case of *Badeau v. Mead*, (14 Barb. 328,) Strong, J., in delivering the opinion of the court, says: "I consider it to be well settled that where the grantor bounds the lands which he conveys, by roads, whether existing or to be made, over lands retained by him, he conveys to the purchaser, *as incident to the grant*, a right to use such roads as described, *when they adjoin the premises*, and, if necessary, out to the common highway. Such right becomes appurtenant to the land conveyed." In that case, the grantor had laid out a tract of land into village lots, and had made and filed a map, upon which the lots, and streets, and alleys adjoining them were described; and the conveyance of the plaintiff's lot was in almost the precise language of the conveyance to the plaintiff in the present case. It conveyed the lot by its number, and bounded it by the southerly line of an adjoining street, and conveyed the appurtenances. The grantor obstructed the end of the

Cox v. James.

street, where it entered the White Plains road. In reference to the street which was obstructed by the grantor, Strong, J., said: "The plaintiff has a right to an unobstructed way to the White Plains road, and can have the fence across it removed, when he seeks for it in an appropriate proceeding." The case was approved by the Court of Appeals, in the case of *Fonda v. Borst*, (2 *Keyes*, 51.) There the defendant had laid out a tract of land into village lots, and had filed his map and conveyed to the plaintiff's grantor a lot by its number, as described on the map. Brown, J., delivering the opinion of the court, repeats the rule laid down in *Badeau v. Mead*, that "when a grantor bounds the lands which he conveys, by roads, whether existing or to be made over the lands retained by him, the purchaser takes, as an incident of the grant, the right to the use of such roads." This, he says, "is the rule as to rural property, so that whether the servitude which the plaintiff claims be a rural or an urban servitude, to this extent his claims could admit of no dispute." In the cases cited, and in the one now before us, the reference to the map upon which the lots conveyed were described, introduced the map into the deeds, and made them a parcel of the deeds, and the several grantees were entitled to the use of the streets, along which their lots were described as lying, as appurtenances to the grants.

The plaintiff is entitled to the unobstructed use of the alley-way along which his lot is described as lying, upon the map. (See opinion of *Wright, J.*, in *Fonda v. Borst*, *supra*.)

The judgment should be affirmed.

[ST. LAWRENCE GENERAL TERM, October 5, 1869. *James, Rosekrans and Potter, Justices.*]

BAILEY vs. BUELL and others, Assessors, &c.

Where, upon the non-payment by the plaintiff of a tax assessed against him, proceedings in the nature of proceedings supplementary to execution were instituted by the supervisor of the town, before the county judge, to compel the plaintiff to pay such tax, pursuant to the statute of 1867, (*Laws of 1867, ch. 861.*) under which the plaintiff was required, by an order of the county judge, forthwith to pay to the county treasurer the tax as assessed and levied, with costs, and an execution was directed to be issued therefor, to the sheriff; whereupon the plaintiff, on being served with a copy of the order, paid such amount to the county treasurer; *Held* that such payment was not, in any just or legal sense, a *voluntary* payment of the tax.

Held, also, that if the assessment was illegal and unauthorized, there could be no question but that the plaintiff had been injured by it; and that, in an action brought by him against the assessors, he might recover back the amount he had been compelled to pay by reason of the wrongful assessment.

When, in such an action, it is claimed by the defendants that the plaintiff was, in fact and in law, a resident of the town, and liable to assessment and taxation there, the question whether the plaintiff was a resident of the town, at the time the assessment was made and completed, is a question of fact for the jury to determine upon all the evidence; and it should be submitted to them.

It is, under such circumstances, proper for the judge to charge the jury that they have nothing to do with the question whether the plaintiff was or was not liable to be assessed and taxed in some other town or place, but that the only question for them to determine is, whether he became a resident of the town where he was assessed, so as to warrant the assessors in assessing him there.

If assessors undertake to assess a person for personal property, who is not a resident of their town, they render themselves liable, in an action brought by the party wrongfully assessed, for the damages he has sustained in consequence of such illegal assessment.

The plaintiff in such an action is not bound to show that he is a taxable inhabitant of some other town or place, in order to maintain it; nor could the contrary be shown, by way of defense. It is enough for him to show, in such a case, that he was not a resident, and the assessors had no jurisdiction over him.

IN 1867, the defendants, who were the assessors of the town of East Bloomfield, Ontario county, assessed the plaintiff as an inhabitant of that town, the sum of \$188.66, being an assessment upon \$10,000 of personal property. He was duly notified of the assessment. Having failed

Bailey v. Buell.

to pay the tax, the same was returned by the collector, and in August, 1868, the supervisor of the town instituted supplementary proceedings, under chapter 361 of the laws of 1867, and on the 19th of September, 1868, an order was granted by the county judge of Ontario county, directing said plaintiff to pay the tax, or an execution would issue against him for the amount. On being served with a copy of said order, the plaintiff paid the amount and costs to the county treasurer, through his attorney. In December, 1868, the plaintiff commenced this action against the defendants, to recover the amount so paid, upon the ground that he was not, at the time of the assessment, a resident or inhabitant of the town of East Bloomfield. The issue was tried at the Ontario circuit in October, 1869.

The question of fact presented to the jury by the evidence and the charge of the judge, was whether the plaintiff was an inhabitant or resident of East Bloomfield, at the time of the assessment. From the evidence of the plaintiff himself, it appeared that for some years prior to 1867, he had resided on a farm in West Bloomfield. That in April of that year, he moved on to a farm he owned in the adjoining town of Richmond, in the same county, having sold the West Bloomfield farm in March, reserving a right to keep some of his personal property in the house on the West Bloomfield farm. He remained on the Richmond farm until the 17th of May, and then sold that farm and moved a part of his personal chattels back to the West Bloomfield house, and the balance of his goods he took to East Bloomfield. At the same time his only child, a daughter, went with him to East Bloomfield and boarded there and attended school. His wife also went there with him and stayed the principal part of the time at her mother's. The plaintiff also stayed and boarded at the house of his mother-in-law in East Bloomfield. He had no other family than himself and wife and daughter.

Balley v. Buell.

He remained there, except when away on business, until this assessment was made, of which he was advised. He claimed on the trial, that his residence was in West Bloomfield. The plaintiff, being examined as a witness, was asked this question: "Had you any intention of taking up a residence in East Bloomfield?" Objected to by the defendants as leading and incompetent, and the very question to be decided by the jury. The objection was overruled, and the defendants excepted to the decision.

When the plaintiff rested, the defendants moved for a nonsuit, on the grounds:

1. That the payment made by the plaintiff, set forth in the complaint, was voluntary, and could not be recovered in this action.

2. That the plaintiff and his wife and daughter, were staying in East Bloomfield, and had no other residence, and he was, therefore, properly assessed there.

The court denied the motion, and the counsel for the defendants excepted.

The defendant proved that he stayed at East Bloomfield, with his wife and daughter, after he sold the Richmond farm, until after this assessment was made. They also proved that he claimed a residence in Richmond. The court charged the jury, among other things, substantially, that the question was, whether the plaintiff made East Bloomfield his home, in such a way as to authorize the assessors to assume that he had taken his residence in that town and intended to do so. That if the plaintiff went to the town of East Bloomfield to visit his friends, and had no intention to stay there, but had a fixed object to go somewhere else, and to make his stay there merely temporary, he did not become a resident of that town so as to give the assessors jurisdiction of him. If they found him living there under circumstances which implied his purpose to stay, and that he came there to stay, without a fixed purpose to go somewhere else; if

Bailey v. Buell.

they found him carrying on business there, having his family there, they would be bound to inquire his object in coming there, and would have a right to assume, if he was in actual business there and staying there steadily at any definite place, that he came there to reside, and would not be trespassers if, acting honestly in that belief, they put him upon the assessment roll. That they would have a right to judge that he was a resident, under these circumstances, and would be only liable for misjudgment when they acted without reasonable ground to believe that he was a resident of the town. If the circumstances were such as to repel the idea that he came there to reside, they had no right to regard him a resident of that town, or to put him down as a taxable inhabitant of that town. That if they were satisfied the evidence did not warrant the assessors in believing him a resident, and did not give them a reasonable ground to believe and act upon that assumption, then they were liable for the consequences. That the jury had nothing to do with the question, as to whether the plaintiff went to East Bloomfield to avoid the tax, or intended to avoid the tax; or whether he was taxable in Richmond or West Bloomfield; but the question was whether he became a resident of the town of East Bloomfield, so as to warrant the assessors in their act. If not, that he was entitled to a verdict for the amount as stated; and any other sum which the plaintiff was obliged to pay to liberate himself from this assessment, or otherwise their verdict would be for the defendants. The amount was \$254.96.

The defendants' counsel excepted to the ruling that this was not a voluntary payment. The plaintiff's counsel excepted to that portion of the charge which instructed them that if the act of the assessors was upon reasonable ground, and in good faith, they were not responsible; claiming it a jurisdictional question, and that they were liable absolutely.

Bailey v. Buell.

The defendants' counsel excepted to that portion of the charge in which the court held that the plaintiff might recover the costs in the proceedings below.

The defendants' counsel then asked the court to charge the jury, 1. That every citizen of the State has a residence in some town, village or city, in which he is liable to taxation. 2. That if at the time the assessment is made he is staying even temporarily in the town, and has no residence in any other town or place, then he is liable to taxation in the town in which he is so staying.

His honor declined to charge the jury in respect to either of said propositions otherwise than he had already charged them; to which refusal the counsel for the defendants excepted.

The jury found a verdict for the plaintiff for \$254.96.

The court ordered that all proceedings on the part of the plaintiff be stayed sixty days, to enable the defendants to make a case and exceptions on which to move for a new trial, and that the same be heard in the first instance at the general term of this court.

E. A. Nash, for the plaintiff.

I. The objections of the defendants' counsel to the question put to the plaintiff, as to his having had an intention of taking up a residence in East Bloomfield, were properly overruled. 1. The form of the question was in the discretion of the court. (*Vrooman v. Griffiths*, 1 *Keyes*, 53.) The question was necessarily leading. 2. A witness may be asked with what intent he did an act. (*Seymour v. Wilson*, 14 *N. Y.* 567. *Griffin v. Marquardt*, 21 *id.* 121. *Forbes v. Waller*, 25 *id.* 439. *Bedell v. Chase*, 34 *id.* 386.) 3. The answer to this question did not injure the defendants; there was no conflicting evidence upon the question of the plaintiff's residence. A verdict for the defendants upon this issue would have been against evidence.

II. The payment by the plaintiff was not voluntary.

Bailey v. Buell.

1. A refusal to comply with the terms of the order of the county judge would have subjected the plaintiff to arrest and imprisonment. Payment under duress of the person or goods of the party paying, is not voluntary. And a person need not suffer arrest before paying money illegally demanded. (*Frye v. Lockwood*, 4 Cowen, 454. *Wisner v. Bulkley*, 15 Wend. 321, 323. *Harmony v. Bingham*, 12 N. Y. 99. *Am. Exch. Fire Ins. Co. v. Britton*, 8 Bosw. 148. *Townshend v. Dyckman*, 2 E. D. Smith, 224.) 2. This action is on the case, to recover damages sustained by the wrongful act of the defendants, and not for money received by or paid to the defendants, and held by them to the plaintiff's use. It is not, therefore, a case in which the question of voluntary payment can arise.

III. The plaintiff could not be assessed for his personal estate, except in the town where he resided at the time of the assessment. (1 *Stat. at Large*, 362, § 5. *The People v. Supervisors of Chenango*, 11 N. Y. 563. *Mygatt v. Washburn*, 15 id. 316.)

IV. The plaintiff was entitled to recover the costs of the supplementary proceedings. These proceedings were the legal and natural consequence of the wrongful assessment.

V. Judgment should be ordered for the plaintiff on the verdict.

H. A. Chesebro, for the defendants.

I. The plaintiff should have been nonsuited. 1. The payment made by him to the county treasurer was voluntary. The payment was made with a full knowledge on the part of the plaintiff, of all the facts, and there was no compulsion, or seizure of property. (*N. Y. and Harlem R. R. v. Marsh*, 12 N. Y. 308. *Union Bank v. Mayor &c.*, 51 Barb. 159. *Com. Bank of Roch. v. The City, &c.*, 42 id. 488. *Fleetwood v. City of N. Y.*, 2 Sandf. 475.) (a.) The county judge made the order that the plaintiff pay the sum of \$237.29, as a judicial act. No appeal was taken,

Bailey v. Buell.

nor any proceeding to reverse or modify it; but on being presented with a copy of the order, the plaintiff voluntary paid the amount. In the *New York and Harlem R. R. v. Marsh*, above cited, the plaintiff was assessed a tax of \$235. The collector called on the treasurer with his warrant and tax list, and demanded the tax. The treasurer paid it, and the company then brought their action, and the court held the payment was voluntary, and could not be recovered back, although there was a defect in the assessment, rendering the tax void. In the *Union Bank &c. v. The Mayor &c.*, (51 Barb. 159,) the action was to recover \$21,916.81, being a tax assessed on a part of the capital of the bank, not liable to taxation. While the question of the liability to tax was pending in the Court of Appeals, the receiver of taxes served a notice on the bank, that if the tax was not paid a warrant would be issued, and a penalty imposed by way of interest. The bank then paid, and brought this action. The general term held the payment a voluntary one, and that the plaintiff could not recover. In *Fleetwood v. The City, &c.*, (2 Sandf. 475,) the owners of city lots which had been sold for the non-payment of void assessments, redeemed the same, by paying to the street commission the amount, with interest and costs. It was held the payment was voluntary, and could not be recovered back; and it was also held, "that where a party without legal compulsion or duress of goods, yields to the assertion of an adverse claim, by paying the amount, he cannot detract from the force of his concession by protesting against the legality of the claim." See also, *Supervisors of Onondaga v. Briggs*, (2 Denio, 26;) *Silliman v. Wing*, (7 Hill, 159.) (b.) The copy of the order of the county judge was not in any sense process. In the cases cited, the warrant in the hands of the collector, at the time of the demand and payment, was a process, by virtue of which the officer could, on refusal to pay at once, seize the personal property of the party

Bailey v. Buell.

assessed. The most that can be claimed by the plaintiff is, that with a full knowledge of the facts, he voluntarily paid the amount embraced in the order, to save the issuing an execution.

II. The plaintiff should have been nonsuited on the second and third grounds of motion. The evidence showed, without dispute, that, 1. The plaintiff, in the spring of 1867, left West Bloomfield, where he had resided for ten years, and took up a residence in Richmond, with his family. 2. Before this tax was assessed, he sold the farm in Richmond, moved all his goods, and left that town with his family, and with his family went to the village of East Bloomfield, where his daughter attended school. He had no other residence than East Bloomfield when assessed. It was there he and his family and property had the protection of the law.

III. The court erred in refusing to charge as requested. 1. Having charged the jury that the plaintiff had no residence in West Bloomfield or Richmond at the time of the assessment, the request was a proper one. 2. I submit, that for the purposes of taxation, thereby contributing to the support of the government, every citizen of the State has a residence, where he is liable to taxation. If a citizen of the State, who has the protection of its laws to his person and property, can escape taxation by "visiting about" during the time the assessors are making their assessments, as was the case here, we shall have a largely increased floating population during a certain portion of the year. 3. It is submitted, that upon the motion made at the trial, and upon the foregoing point, the plaintiff should have been nonsuited.

By the Court, JOHNSON, J. The counsel for the defendants moves for a new trial on two grounds, only: 1. That the judge at the circuit erred in refusing to nonsuit the plaintiff upon the ground on which the motion for a non-

Bailey v. Buell.

suit was made; and, 2. That the judge erred in refusing to charge the jury as requested by the defendants' counsel.

The first ground upon which the nonsuit was asked, was that the payment of the tax, made out upon, and annexed to, the assessment, was voluntary, and therefore no action could be maintained on account of such payment. It would be, perhaps, a sufficient answer to the motion on this ground, that this is not an action to recover back the money paid, as an action for money had and received, but an action in the nature of an action on the case, to recover the damages sustained by the unlawful assessment. In each of the cases cited by the defendants' counsel, the action was to recover back the money paid, in an action as for money had and received, and the question was whether the payment was voluntary, or upon some compulsion, at the time it was made.

The principle of voluntary payment applies in such actions only. In all actions in the nature of actions on the case, for a wrong, the question is whether the plaintiff has been injured by the wrong complained of. But if the principle of voluntary payment could be held to apply in actions of this kind, the cause of which is an alleged illegal assessment, it could not affect this case. The payment here was not in any just or legal sense a voluntary payment. The case shows that the tax was not paid by the plaintiff to the collector of taxes for the town in which the plaintiff was assessed, but that such collector returned the tax uncollected, for want of goods and chattels out of which to collect the same; and that thereupon, in the month of August, 1868, the supervisor of the town in which such plaintiff had been assessed and taxed, instituted before the county judge of Ontario county, proceedings in the nature of proceedings supplementary to execution in civil actions, to compel the plaintiff to pay such tax, pursuant to the statute of 1867. (*Sess. Laws of 1867, ch. 361.*) Under this proceeding the plaintiff was, in pur-

Bailey v. Buell.

suance of an order to that effect, made to appear before the county judge, and be examined under oath concerning his property. Afterwards, and in this proceeding, the county judge made a peremptory order requiring the plaintiff forthwith, on service of a copy thereof on him, to pay to the county treasurer of said county the tax as assessed and levied, amounting to the sum of \$198.09, and the further sum of \$39.20, costs and disbursements of the proceeding, and that execution be issued therefor to the sheriff of said county. Upon the service on the plaintiff, of a copy of this order, he paid the amount so ordered and adjudged, to the county treasurer. The only property, as it appears, which the county judge discovered, in the proceeding, belonging to the plaintiff, was \$500, deposited to his credit in the bank of Lima, Livingston county.

It will be seen, therefore, that this was in no sense a voluntary payment of the tax founded upon the assessment, but a payment upon a peremptory order of the county judge, in another proceeding, in the nature of a bill of discovery, to compel the payment of such tax, with costs of such proceeding.

If the assessment was illegal and unauthorized, there can be no question but that the plaintiff has been injured by it.

The second ground of nonsuit urged, was that the plaintiff was, in fact and in law, a resident of the town of East Bloomfield, and liable to assessment and taxation there, inasmuch as it appeared that himself and his family were actually living there when the assessment was made, and there was no evidence that he had any other residence. The question whether the plaintiff was a resident of that town at the time the assessment was made and completed, was a question of fact for the jury to determine, upon all the evidence, and it was properly submitted to them. The motion for a nonsuit was therefore properly denied.

The request of the defendants' counsel to the judge to

Bailey v. Buell.

charge, was: 1st. That every citizen of the State has a residence in some town or village or city, in which he is liable to taxation. 2d. That if, at the time the assessment is made, a citizen of the State is staying even temporarily in a town, and has no residence in any other town or place, he is liable to assessment and taxation in the town in which he is so staying.

The judge refused to charge as requested, on either proposition, in any other or different manner than he had already charged, and the defendants' counsel excepted. The judge had charged the jury that they had nothing to do with the question whether the plaintiff was or was not liable to be assessed and taxed in some other town or place, but the only question for them to determine was, whether he became a resident of the town of East Bloomfield, so as to warrant the assessors in assessing him in that town. The charge, as given, laid down the true rule, and the judge very properly refused to charge as requested. The town or place in which an inhabitant may be assessed and taxed is prescribed by statute, and it does not follow that a person may be lawfully assessed and taxed in a town in which he is confessedly not a resident, merely because he happens to be there temporarily when the assessment is being made, in case it should turn out that he is not a taxable inhabitant of some other town or place in the State, though a citizen of the State.

The plaintiff was assessed for personal estate only. The statute (1 R. S. 389, § 5) provides that "every person shall be assessed in the town or ward where he resided when the assessment was made, for all personal estate owned by him." He must be assessed where he resides, for such property, and cannot be assessed for it elsewhere. If the assessors undertake to assess a person for that description of property, who is not a resident of their town, they render themselves liable, in an action by the party wrongfully assessed, for the damages he sustains in consequence of

The People v. Norton.

such illegal assessment. This is conclusively settled. (*People v. Supervisors of Chenango*, 11 N. Y. 563. *Mygatt v. Washburn*, 15 *id.* 316.) The plaintiff, in such an action, is not bound to show that he is a taxable inhabitant of some other town or place in order to maintain it; nor could the contrary be shown by way of defense. It is enough for him to show, in such a case, that he was not a resident, and the assessors had no jurisdiction over him to make such assessment.

The jury having found, under proper instructions from the court as to what constituted a person a resident of a town, within the meaning of the statute, that the plaintiff was not a resident of East Bloomfield at the time the assessment was made, properly gave a verdict in his favor for the amount he was compelled to pay by reason of the wrongful assessment.

A new trial must therefore be denied.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, February 6, 1871. *Mullin*, P. J. and *Johnson* and *Talcott*, Justices.]

THE PEOPLE, *ex rel.* William Clark, *vs.* LUTHER M. NORTON.

The word "adoption," as used in section 15 of article 7, of the State constitution, of 1867-8, which declares that "The existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their offices until the expiration of their respective terms," means, "the adoption of this article as a part of the constitution." It does not refer to the time when the votes should be cast, and canvassed, and declared, and the people should have decided to discard the corresponding article in the former constitution, and to put the new one in its place, but to the time when the article should be fully and completely adopted as a part of the constitution.

It means an adoption consummated and completed, and not one *inchoate* and *imperfect*.

Accordingly, where the defendant was duly elected to the office of county judge of Wayne county, at the general election in November, 1869, for the

The People v. Norton.

term of four years, to commence on the 1st day of January, 1870, and took the oath of office, and entered upon the duties of the office, and continued to discharge such duties until the general election in November, 1870, *it was held* that there was no vacancy in the office, to be filled at that election; that the defendant, entering upon such office simultaneously with the adoption of such 6th article of the constitution, and being in, at such adoption, was entitled to hold his office until the expiration of the term for which he was elected.

THIS was an action in the nature of a writ of *quo warranto*, brought for the purpose of removing the defendant from the office of county judge of the county of Wayne, into which office, it is alleged, he has intruded himself "without right or lawful authority," and for the purpose of putting the relator and plaintiff, Clark, in possession of that office, to which he claims to have been lawfully elected.

The action was tried by the court without a jury, in January, 1871. The following facts were agreed upon, by a stipulation signed by the counsel for the respective parties :

1. That previous to the 1st day of November, in the year 1869, George W. Cowles was the lawful county judge of Wayne county, and duly elected and sworn.

2. That the office of county judge of the said county of Wayne became vacant on or previous to the 1st day of November, 1869, but subsequent to the 15th day of October, in that year, by the resignation of the said George W. Cowles, and the due acceptance of said resignation, and on that day was vacant. That on said 1st day of November the Governor of the State duly appointed Charles McLouth to the office of county judge of said county, to fill the vacancy occasioned by the resignation of said George W. Cowles.

3. That said Charles McLouth duly accepted said office, and on said 1st day of November duly qualified, by taking the oath of office required by law, and depositing the same in due form with the clerk of said county of Wayne, with his bond, in due form of law, executed by sufficient sure-

The People v. Norton.

ties, and duly approved, and entered upon the discharge of the duties of said office; and that said Charles McLouth lawfully held and was in said office on said 1st day of November, and continued to be in and hold said office from said 1st day of November until the 1st day of January then next ensuing, and no longer.

4. That at the general election, held according to law on the second day of November, 1869, eight thousand and seven votes were given and cast by the electors of said county of Wayne for a person to fill the office of county judge of said county of Wayne, of which the said defendant received four thousand four hundred and ninety-nine, and said Charles McLouth received three thousand five hundred and three.

5. That on the Tuesday next succeeding said election, the county canvassers of said county of Wayne met at the county clerk's office of said county and organized according to law, and, among other things, canvassed the votes cast at said general election by the electors of said county of Wayne, for the office of county judge of said county of Wayne, and then and there certified, according to law, the result to be as above stated, and duly authenticated their certificate, and thereupon determined that said defendant was, by the greatest number of votes, elected to the office of county judge of said county of Wayne, and did then and there award to the defendant a certificate of their determination as aforesaid.

6. That on or about the 18th day of December, 1869, the defendant took and subscribed the oath of office in due form, before the clerk of said county of Wayne, as county judge of said county of Wayne, and filed the same with said clerk, and at the same time executed, with sufficient sureties, a bond to the people of the State of New York, conditioned for the faithful performance of his duties as surrogate of said county, and in all things complying with the requirements of the statutes in relation to the bonds

The People v. Norton.

of surrogates, upon which bond said clerk duly indorsed the proper certificate of his approval thereof, and filed the same in his office.

7. That said defendant, claiming to be entitled to take and hold the office of county judge of said county of Wayne, by reason of his having received a majority of the votes cast at said election, as above stated, and said canvass of votes, and said determination, and having complied with the requirements of the statutes as above stated, on the 1st day of January, 1870, entered upon the discharge of the duties of said office, and has from thence hitherto continued and still continues to exercise the functions and discharge the duties of said office, and that said defendant then was, and still continues to be, a resident of the county of Wayne.

8. That at the general election, held according to law, on the 8th day of November, in the year 1870, one hundred and thirty-eight votes were given and cast by the electors of said county of Wayne, for the office of county judge of said county of Wayne, all of which votes were given and cast by the electors of the town of Huron, in said county, and all of which were received by the said plaintiff William Clark, and no votes were cast for that office for any other person; and that said plaintiff, William Clark, then was, and still continues to be, a resident of said county of Wayne.

9. That on the Tuesday next succeeding said last mentioned general election, the county canvassers of said county of Wayne met at the county clerk's office of said county, and organized according to law, and among other things, canvassed the vote cast at said last mentioned general election, by the electors of the said county of Wayne, for the office of county judge of said county of Wayne, and then and there certified, according to law, the result to be as above stated, and duly authenticated their certificate, but did not thereupon determine whether the said William

The People v. Norton.

Clark was or was not by the greatest number of votes elected to the office of county judge of said county, but declared that said votes so cast for said William Clark were null and void, for the reason that there was no vacancy in said office.

10. That the on 26th day of November, 1870, the said William Clark took and subscribed the oath of office in due form, before the clerk of said county of Wayne, as county judge of said county of Wayne, and filed the same with said clerk, and at the same time executed, with sufficient sureties, a bond to the people of the State of New York, conditioned for the faithful performance of the duties of the office of surrogate of said county, in all things complying with the requirements of the statutes in relation to the bonds of surrogates, upon which bond the said clerk duly indorsed the proper certificate of his approval thereof, and filed the same in his office.

11. That no notice was given at any time by the Secretary of State, or any other officer authorized by law, to any person or officer, either written or printed, that there was or would be a vacancy in the office of county judge of Wayne county, proper to be filled or supplied, either at the said general election held in November, 1869, or at said general election held in November, 1870, nor was any such notice published in the State paper, or in any other manner.

12. That ever since the canvass of said votes cast at said general election, held in November, 1870, the said defendant, Luther M. Norton, has continually excluded, and still excludes said William Clark from said office of county judge of said county of Wayne.

The judge found the facts to be as stated in the stipulation; and as conclusions of law, he found that the defendant was entitled to have the office of county judge of Wayne county, for the term of four years from the 1st day of January; 1870.

The People v. Norton.

The following opinion was given by the justice before whom the action was tried.

DWIGHT, J. The constitutional amendment known as the new judiciary article, was adopted subject to the limitation (as to the time of its taking effect) imposed by section 5, article 14, of the proposed constitutional amendment. (*The People v. Real*, 42 N. Y. 270.) It is as if that limitation had been expressed in, and made part of, the article in question. By its own limitation, therefore, the amended judiciary article, though adopted at the annual election of 1869, was of no effect before the 1st day of January, 1870. Until that day the judiciary article of the constitution of 1846 was of full force and effect. Under its provisions, at the annual election of 1869, the defendant was duly elected to the office of county judge of Wayne county, for the term of four years, to commence on the 1st day of January, 1870. The will of the people in his election, and in the adoption of the constitutional amendment, was simultaneously expressed.

Section 15 of the amendment provides: "The existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their office until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for six years." It is contended on the part of the relator that the defendant was not in office "at the adoption of the article;" that the provision above quoted did not therefore apply to him, but to the incumbent of the office, whom he was elected to succeed; that the election of the defendant was thereby rendered nugatory, and that the successor of the judge in office at the time of the adoption of the article must be thereafter elected for the term of six years; that the relator was so elected at the annual election of 1870, and therefore that he, and not the defendant, is entitled to the office in question.

The People v. Norton.

It is clear that these propositions cannot be maintained, unless the words "at the adoption of the article," as used in the section quoted, are to be construed to include the time of the casting and canvassing of the votes on the amendment. It must of course be conceded that such is the literal import of the words, and that the article was in fact adopted at that time, as held, in construing another provision of the amendment, in the case of *The People v. Real*, (*supra*.)

But nevertheless, it is clear, I think, that such construction cannot be given to the words as they occur in the provision now under consideration. Constitutional and legislative enactments are to be so construed as to give effect to the evident intention of those who enact them. "That intention is to be deduced from a view of the whole and of every part of the enactment, taken and compared together. The real intention, when actually ascertained, will always prevail over the literal sense of terms, and the reason and intention of the law giver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity." (1 *Kent's Com.* 462.)

It was the evident intention of the framers of the provision in question, and of the people in adopting it, not only that the county courts should be continued, but that judges of those courts should be continued in office in all the counties of the State in which such courts existed, and that without interregnum or suspension.

It will be found impossible to give uniform effect to this intention, except by construing the words "at the adoption of this article," to mean at the time of its taking effect.

In Wayne county, and in three other counties of the State, the term of office of the county judge in office at the time of the election and canvass of 1869, expired on the 31st day of December of that year. In all the other

The People v. Norton.

counties of the State such terms of office extended over periods severally of one, two and three years after that date. In the case of all the last mentioned counties, the provision in question, by either construction, continues the county judge in office. In the case of the four counties falling within the former category, the construction contended for involves the anomaly of postponing the election of judges until after the expiration of the terms of office of their predecessors, leaving the offices vacant in the meanwhile, and providing no mode of filling the vacancies; while at the same time it nullifies the election of judges made simultaneously with the adoption of the provision itself. That construction also involves a palpable absurdity. It makes the provision in question relate to and continue a term of office which terminated before that provision took effect, viz., the tenure of the four county judges whose terms expired on the 31st of December, 1869.

It was clearly not the intention of those who enacted the constitutional provision, to make an exception in the case of the counties whose election of judges chanced to take place in 1869, but to continue judges in office in those counties as well as in the other counties of the State. If, therefore, a judge is continued in office in Wayne county, to what judge did the provision apply? It could not apply to him whose term expired before the provision took effect; it could only apply to him whose term commenced concurrently with the operation of the provision in question.

To construe the words "at the adoption of this article" to mean at the time of its taking effect, gives to the provision considered an effect reasonable, uniform and consistent with the evident intention of its enactors; to construe it as contended for by the relator, gives it an effect anomalous, absurd, partial and contrary to its evident intention. The elementary rules of constitutional

The People v. Norton.

and statutory construction require that it receive the former interpretation. It was urged on the part of the relator that there was reason for the construction contended for, in the fact that the jurisdiction of the county courts was greatly enlarged by the amendment, and that it was not consistent with the intention of the people in adopting it, that the defendant, elected under the old constitution, should assume the increased duties and responsibilities of the new office. But this also is to urge a partial and exceptional operation for the provision in question. In fifty-six counties in the State, under either construction, judges elected to office under the old constitution are continued in the new; five for one year, forty-six for two years, and five for three years. It is equally consistent with the intention of the provision that the four elected in 1869 should be continued for the term of four years.

If the views above expressed are correct, the defendant is entitled to hold the office in question. Having been duly elected in 1869, and having duly qualified within fifteen days after notice of his election, his term commenced with the 1st day of January, 1870. He was in office at the moment when the constitutional amendment took effect; and by its provisions, as I have construed them, he was continued in office during the term for which he was elected.

From the judgment entered upon this decision the plaintiffs appealed.

Marshal B. Champlain, (Att'y Gen.) and W. F. Cogswell,
for the appellants.

I. The article of the constitution in question was adopted when and as soon as the board of State canvassers had declared the result of the election. (*Real v. The People*, 42 N. Y. 270, and the cases there cited.) This took place before the 1st of January, 1871.

The People v. Norton.

II. If the article in question was adopted at the time stated in the above point, then as the defendant was confessedly not in office at that time, he is not one of the judges provided for by the first sentence of the article above quoted.

III. The relator has been chosen as the successor of the judge in office at the time of the adoption of this constitution, (Mr. McLouth,) and as such is entitled to hold the same.

IV. The new judiciary article of the constitution was in force from and including the 1st day of January, 1870, and not previously. It was in force every instant of said 1st day of January. (*The People v. Real*, 42 N. Y. 270.) Its adoption took place previous to said first day of January. It could no more be in full force without a previous adoption, than a law could be in force without a previous enactment.

V. Section 15 of the new judiciary article provides for the election of all the successors of the county judges in office at the time of its adoption. It necessarily follows that these successors must be elected under its provisions, and while it is in force, and that no one could be the successor of any county judge in office at its adoption, unless he should be elected under its provisions.

VI. The mandate of § 15 of the new judiciary article is, that these successors shall be chosen; that is, that they shall be chosen at a future time. The mandate of this section also requires these successors to be chosen for the term of six years; that their terms shall be six years, and the electors shall have the opportunity of voting for them with reference to that term.

VII. Charles McLouth was in and held the office of county judge of Wayne county at the time of the adoption of the new judiciary article, his term commencing the day before the general election in 1869, and ending with the year 1869. The defendant not having been in

The People v. Norton.

the office under, the old judiciary article, nor elected under the new, is expressly excluded from the office.

VIII. The relator is entitled to the office of county judge of Wayne county, having, by the greatest number of votes, been elected thereto at the general election in 1870, and a vacancy having then existed therein, required to be filled at said general election. (*Const. art. 10, § 5. Sess. Laws of 1849, ch. 28 as amended, ch. 45. 1 R. S. 415, 5th ed. Laws of 1847, ch. 240. 1 R. S. 420, 5th ed.*)

IX. By all the acknowledged rules of interpretation and construction, § 15 of the new judiciary article must be upheld in its literal signification. 1. Section 15 is in no respect obscure, uncertain or ambiguous in its import or signification, and is not properly the subject of construction or interpretation. It construes and interprets itself. "Where words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation." (1 *Story on the Const.* 384, § 401.) "Where words are plain, clear and determinate, they require no interpretation." (*Id.* 387, § 405. *See also p.* 383, § 400, *et seq.*) 2. If § 15 is held to be open to interpretation or construction, it is proper to examine it with reference to the objects sought to be attained by it. To examine it with reference to the principles which are presumed to have governed its enactors in its formation and adoption. To compare the words and expressions used in it with the same words and expressions used elsewhere in the judiciary article. To endeavor to ascertain the intention of its enactors, from the whole judiciary article. To look at the history of its formation, consideration and perfecting. 3. The object of the change in the constitution in relation to the county courts, was to elevate their character and relieve the Supreme Court, by drawing business to the county courts. So the jurisdiction of these courts was made almost equal to that of the Supreme Court, the term of the judges extended from four to six

The People v. Norton.

years, and it was provided that their salaries should be fixed, not by the boards of supervisors, but by law. To have dismissed all the the county judges and provided for the election of new ones, with reference to the enlarged jurisdiction of the county courts, would have further tended to the attainment of the object. 4. Sound principle required that where the term of any officer was extended, or the jurisdiction of any court was enlarged, the officer or judge who should take the extended term or exercise the enlarged jurisdiction, should be elected by the people with reference to the longer term and the enlarged jurisdiction. It is as much the right of the people, under a republican government, to elect their officers with reference to the length of their terms and the extent of their powers and duties, as to elect them at all. 5. The word "adoption" must be held to be used in the same sense, wherever it occurs in the judiciary article. It occurs five times in the judiciary article and once in the last section of the proposed constitution, which section, it is held, must be treated as if incorporated in the judiciary article. If the constitution had been voted upon previous to the general election in 1869, the question would have arisen upon the meaning of the word adoption, where it occurs in § 13, in ascertaining the length of the terms of the justices of the Supreme Court elected in 1869. If adoption, in the last section of the constitution, is made to mean, as it is claimed to mean in the 15th section, that section will read as follows: "This constitution shall be in force from and including the first day of January next after" it shall take effect. 6. It is clear from the whole judiciary article, that the convention intended that no one not actually in office at the time of the adoption of the article should hold the extended term fixed by it for judges and justices of the supreme, city and county courts, or exercise the enlarged jurisdiction of the county courts, unless elected by the people with reference to such extended term and

The People v. Norton.

enlarged jurisdiction. The county judges in office at the adoption of the new article were retained to the end of their terms, notwithstanding the jurisdiction of the county courts was enlarged, because it seemed impolitic or unjust to turn them out in the midst of their terms. No such reason existed for letting into the office of county judges, persons elected at the time of the adoption of the new article. The new article seems to have been constructed with the express view to exclude them from office. 7. The history of the passage of the 15th section through the convention, shows that the convention intended that it should have its literal signification. It was first reported substantially as the old judiciary article, except that the legislature were authorized to extend the jurisdiction of the county courts indefinitely; the term of county judges was fixed at seven years, and a provision for continuing the judges "*in office when this article shall take effect,*" was contained in what is now § 25 of the new judiciary article; after the section in relation to county courts had been considered in convention, and the term of the judges fixed at six years, and the jurisdiction of the courts fixed as it now stands, the judiciary article was reported complete. The article was then again sent back to the judiciary committee for amendment and revision. The committee amended the 15th section by making it provide that the judges "*in office at the adoption of this article,*" instead of those in office when the article should take effect, should hold their offices until the expiration of their respective terms, and that their successors should be chosen for the term of six years. If the convention had not intended the change they would not have made the alteration. Can the courts now, since the adoption of the judiciary article, change it back to what the draft was before the last revision in convention? (*See vol. 5 Proceedings of Const. Convention, pp. 3457, 3773; vol. 2 p. 1316.*) 8. No foundation for the idea of the judge at the circuit,

The People v. Norton.

that the enactors of the constitutional amendment intended that judges of county courts should be continued in office in all the counties of the State in which such courts existed, and that "*without interregnum* or suspension," (supposed to mean without a vacancy,) is found in the new judiciary article. All knew that if a vacancy occurred, the constitution and laws made ample provision for promptly filling it. If the question of the occurrence of a vacancy was considered by the enactors of the article, it was determined by them that the evils arising from the occurring of vacancies were less than the evils of imposing upon county judges, for the term of four years or more, duties and responsibilities with reference to which they had not been elected. The language of the judiciary article clearly shows that the enactors of the article intended that no one should hold the office of county judge unless actually in office at the time of the adoption of the article, or elected under its provisions, and it is of no consequence whether the question of a vacancy was considered or not, and of little consequence whether a vacancy should be produced or not. 9. What the judge at the circuit calls a construction of section 15, is in fact an alteration of that section. The section as it stands, refers to the action of the electors in the adoption of the article. The judge alters it, and makes it refer to the operation of the article itself, by which it is made to take effect. The section provides for the election of the successors of the judges in office in November. The judge alters it and makes it provide for the election of the successors of judges in office in January. 10. The idea of the judge at the circuit, that the effect of the 15th section of the judiciary article, as claimed by the plaintiffs, involves a "palpable absurdity," is erroneous. The object of the enactors of the judiciary article, and the effect of the article, are simply to allow the county judges actually in office at the adoption of the article, to serve out their

The People v. Norton.

terms—to serve out their terms to which they were entitled under the old article, notwithstanding the adoption of the new article. The judges whose terms expired with the year 1869 were not reached by section 15, but were properly referred to for the purpose of providing for the election of their successors. 11. The idea of the judge that the plaintiff's construction makes the counties in which the terms of the judges expire with the year 1869 exceptional, is equally erroneous. By section 15 all the county judges in office at the adoption of the new article are to hold till the end of their respective terms, and all their successors are to be elected under the new article, and for the term of six years. Under the alteration which the judge would make, the counties in which the terms of the judges expired with the year 1869 would be exceptional, the successors of the judges in office at the adoption of the new article not being elected under the new article, and holding only four years.

X. Under the alteration of the 15th section, which the judge would make, Norton could not take the office. He was not in office at the time the new judiciary article took effect. In order to enable Norton to be in office when the new article took effect, Norton must first be in office, and the new article must take effect afterwards. The article was in full force and effect the first instant, the first point of time in the year 1870. Norton was not in office before that. If Norton took office and the judiciary article took effect at the same point of time, Norton was not in office when the article took effect, nor did the article take effect when Norton was in office.

XI. The judgment and order dismissing the complaint should be reversed, and judgment entered that the defendant is not entitled to the office of county judge of Wayne county, and that he be ousted therefrom, and that said William Clark is entitled to and that he be put in possession of the same.

The People v. Norton.

H. B. Selden, for the respondent.

The election of the defendant to the office of county judge, at the general election in 1869, was regular and valid, under the constitution of 1846, and the laws then in force. 1. The constitution provides as follows: "There shall be elected in each of the counties of this State, except the city and county of New York, one county judge, who shall hold his office for four years." (*Const. art. 6, § 14. 1 R. S. 53, Edm. ed.*) 2. In October, 1869, George W. Cowles was county judge of Wayne county, and between the 15th day of that month and the 1st day of November following, he resigned that office; his resignation was duly accepted, and the office became vacant. (*Const. of 1846, art. 10, § 8. 1 R. S. 122, § 34, sub. 2, Edm. ed. p. 112.*) 3. On the 1st day of November the Governor appointed Charles McLouth to that office, such appointment expiring at the end of the year 1869. "The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy, shall hold his office, by virtue of such appointment, longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." (*Const. art. 10, § 5. 1 R. S. 61, Edm. ed.*) The legislature complied with this direction, so far as the office of county judge is concerned, (there having been before no provision of law on that subject,) by the act of February 3d, 1849, as follows:

"Whenever vacancies shall exist or shall occur in any of the offices of this State, where no provision is now made by law for filling the same, the Governor shall appoint some suitable person who may be eligible to the office so vacant or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election, after the happening of the vacancy, at which such officer could be by law elected." (*Laws of 1849, ch. 28, p. 26.*) The political year begins on

The People v. Norton.

the first day of January. (*Const. art. 10, § 6. 1 R. S. 62, Edm. ed.*) "All officers elected by the people, unless they shall be elected to supply vacancies then existing, shall enter on the duties of their respective offices on the 1st day of January following the election at which they shall be chosen." (1 *R. S. 116, § 3.*) 4. At the general election held on the 2d of November, 1869, the defendant was duly elected to the office of county judge, and was entitled, by force of the constitutional and statutory provisions above referred to, to enter upon the duties of that office on the 1st of January, 1870, and to hold the office for four years from that time. This vacancy was properly to be supplied at that election. The 8th section of title 2 of the statute providing for "elections other than for militia and town officers," (1 *R. S. 128,*) as amended by the laws of 1847, chap. 240, section 6, (*Laws of 1847, p. 264,*) is as follows: "All vacancies in any of the offices named in the first and second sections of this title, (which includes county judges,) except Governor, &c., shall be supplied at the general election next succeeding the happening thereof." (1 *R. S. 118, § 8, Edm. ed.*) 5. This vacancy having occurred after the 15th of October, notice of the election could not be given by the Secretary of State; but the want of notice does not invalidate the election. (1 *R. S. 130, §§ 2 and 3, as amended by chap. 240 of 1847, §§ 7 and 8. Laws of 1847, p. 264. 1 R. S. 119, Edm. ed.*) Those sections, as amended, are as follows: "§ 2. The Secretary of State shall, between the first days of July and September in each year, direct and cause to be delivered to the sheriff, or clerk or county judge of each county, a notice in writing, specifying all the officers (county officers excepted) specified in the first section of title second of this act, whose term of service shall expire on the last day of December thereafter, and a like notice specifying the several officers to be chosen in such county at the next general election. § 3. If any vacancy shall exist in a county, proper to be supplied at

The People v. Norton.

the ensuing general election, he shall in like manner, between the first day of July and the 15th of October previous to such election, direct and cause to be delivered to the sheriff, clerk or county judge of such county, a notice in writing, specifying the cause of such vacancy, the name of the officer in whose office it has occurred, and the time when his term of office will expire; and if any such vacancy shall exist in a district, he shall in like manner direct and cause to be delivered to the sheriff, clerk or county judge of each county therein the like notice." (1 *R. S.* 119, §§ 2, 3, *Edm. ed.*) The vacancy, it will be seen, came too late for notice to be given, and yet the election was required to take place, and was valid without notice. (*The People v. Cowles*, 13 *N. Y.* 351, 358, 359.) The constitutional provision under which the election in *The People v. Cowles* took place (*Const. of 1846*, art. 6, § 13; 1 *R. S.* 52, *Edm. ed.*) is not applicable to this case, but the statute above quoted, section 8, title 2 of the election law, is to the same effect, and is of equal force in this respect with the constitutional provision.

The statute appointing the first election of judicial officers, under the constitution of 1846, expressly provides that "no such election shall be invalid by reason of the omission to give any such notice." (*Laws of 1847*, ch. 276, § 6, p. 307.) The relator in this case is in no position to object to the election of the defendant on account of want of notice. No notice, official or other, appears to have been given in his case, and it is a fair inference from the facts, that the matter was managed artfully, as only 138 votes were cast, and those in only one out of fifteen towns in the county. At the election at which the defendant was chosen, although no official notice was given, it is obvious that full *actual* notice was given, as over 8000 votes were cast for the office, of which the defendant received a majority of over 900. The defendant, therefore, was duly elected to the office of county judge, and was

The People v. Norton.

entitled to hold the office for four years from and including January 1, 1870, the term for which he was elected, unless his right is cut off by the amended judiciary article which taken the place of article 6 of the constitution of 1846, under which he was elected.

II. The new judiciary article of the constitution confirms the right of the defendant to hold the office "until the expiration of the term" for which he was elected. (*Const. art. 6, as amended, § 15. Voorhees' Code, 10th rev. ed. p. 764.*) The language of the section, so far as it bears upon this question, is quoted in the opinion of Judge Dwight. It is difficult to add anything to the argument in favor of the judgment appealed from, contained in that opinion. The absurdity, injustice and inconvenience which would result from the plaintiff's interpretation of the constitution, shows that it cannot be the true interpretation, as such could not have been the intention of its framers. The true meaning of the expression, "at the adoption of this article," unquestionably is, "at the adoption of this article as a part of the constitution of the State," which did not occur until January 1, 1870, at which time the defendant was "in office." (*The People v. Real, 42 N. Y. 270.*) Prior to that time the people had not adopted the article in question as a part of their constitution; they had merely voted that they *would adopt it*, as such, on that day. In one sense, the vote on the 2d of November may properly be called an adoption; but in a sense equally natural, if not equally literal, the adoption of the article by the people, as a part of their constitution, took place on the 1st of January, 1870. The expression "in office at the adoption of this article," in section 15, has, in my judgment, the same meaning as the words "now in office," in section 6. Taking those words in the latter section *literally*, and looking at the time when the declaration was made, the expression would apply only to the justices of the Supreme Court in office on the

The People v. Norton.

2d day of November, 1869. Four of the justices of the Supreme Court, now acting in that capacity, hold their offices by virtue of the interpretation of the words "now in office," spoken by the electors November 2d, 1869, as meaning "in office January 1, 1870." Is that a less broad departure from the literal meaning of the words than that which we ask for section 15? Both departures, if they be departures, from the literal meaning of the words, (which may be doubtful,) are in accordance with the manifest intention of the framers of the amendment, and are necessary to avoid "injustice, contradiction and absurdity." (1 *Kent's Com.* 462. *Sedg. on Statutory and Const. Law*, 232 to 234, and cases there cited.) Such latitude of interpretation is not only allowable, but is often indispensable, and the books are full of examples and authorities in its justification. The rule on this subject is well stated by Chancellor Walworth, in *Donaldson v. Wood*, (22 *Wend.* 397,) as follows: "Legal hermeneutics, when applied to the construction of statutes, teach us to reject a construction which is contrary to natural justice and equity, or which will necessarily be productive of practical inconvenience to the community, unless the language of the lawgiver is so plain and explicit as not to admit of a different construction." What "inconvenience to the community," as well as what injustice to the persons elected to the office of county judge in the fall of 1869, would be produced by the construction of the constitution insisted upon by the plaintiffs, is well shown by the opinion of Judge Dwight in this case. From the earliest times, statutes have been construed according to the obvious intention of the makers, although such construction might not accord with the literal meaning of all the words of such statutes. No other reporter or law writer has given such careful attention to this subject as *Plowden*, and I give a brief summary of the leading cases reported by him, bearing upon this question, availing myself of the argument

The People v. Norton.

of *Hardres*, counsel, in the case *Vere v. Sampson et al.*, (*Hardres' Rep.* 205, 208.) *Plow. Com.* 82. It is said by Saunders, J., that though a statute give a penalty, yet things that are not within the words shall be taken within the equity; for that the words are but the image of the law, the life and soul whereof rests in the minds of the expositors. *Plow. Com.* 205, (*Stradling and Morgan's case.*) The intention of the makers of the law is the sure rule of interpreting the law, which the judges must collect, sometimes from the occasion and necessity of enacting it; sometimes from the words themselves, and sometimes from foreign circumstances; and the intention of the law makers must be taken according to what is consonant to reason and discretion. *Plow. Com.* 248, (*Lord Berkeley's case.*) What is taken to be within the intention of an act, though not comprehended within the precise words of it, is equivalent to what is within the express words, and as strong. *Plow. Com.* 363, *a*, (*Stowel and Zouch's case.*) Every law consists of two parts, the words and the sense; these two make up the law, and it is the office of an expositor to put such a sense upon the letter as is consonant to equity and right reason. *Plow. Com.* 465, *a*, (*Eiston and Stud's case.*) It is not the words, but the sense, that makes the law; the letter is but the body, the sense is the life of it; the word is but the shell, the sense is the kernel. (*Id. fol.* 466 *b*, 467 *a*.) That equity must of necessity take place in exposition of all laws, and equity makes no difference between penal laws and others, and the best way to expound a law is to consider what answer, in all probability, the law makers would have given to such a question proposed to them. (*See Bacon's Abr. Stat. I*, 6.) Apply that test here, and ask what answer any voter would have given on the 2d of November, to the question whether he intended to continue in office the county judges elected to prior to 1869, and to cut off those elected in 1869. Can there be any doubt what his

The People v. Norton.

answer would have been? By virtue of the answer which we say would be given to that question, four of the justices of the Supreme Court now serving as such, as well as the county judges elected at the same time, hold their offices; for there is no difference, in respect to the bearing of that question, between the expression "in office at the adoption of this article," in section 15, and "now in office," in section 6. The following cases, with many others, recognize the principles upon which our interpretation rests. (*The People v. Utica Ins. Co.*, 15 John. 380. *Jackson v. Collins*, 3 Cowen, 89, 96. *Walker v. Devereaux*, 4 Paige, 252. *Dresser v. Brooks*, 3 Barb. 451. *Bac. Abr. title Statutes*, I, 5, 6.)

By the Court, JOHNSON, J. The question on which this case turns is, whether there was a vacancy in the office of county judge of Wayne county, at the general election in November, 1870.

The defendant was regularly elected to that office, at the annual election in 1869, under and according to the constitution and laws then existing and in force. The office of county judge in that county included the office of surrogate of the county also, and the term of office for each was four years. He was elected to fill the vacancy which would otherwise happen, on and after the 31st day of December, of that year, by the expiration of the previous term, and of the office of the then incumbent, to the end that there might be no vacancy in the office, and no interruption to the exercise of the powers and functions pertaining to that court.

On the 18th of December, 1869, the defendant took and subscribed the oath of office, in due form, which was duly filed, and executed the bond required to be executed for the faithful performance of the duties of surrogate of said county, which was duly approved and filed. On the first of January, 1870, he entered upon the duties of the offices

The People v. Norton.

of county judge and surrogate of said county, which duties he has continued to perform, and still continues to perform.

The relator and appellant claims the office by virtue of an election thereto at the annual election in 1870, and insists that the office was then, in law, vacant. If the office was then vacant, it is conceded that he is entitled to it by virtue of such election. If not vacant, the election, so far as that office is concerned, was a nullity. The present constitution provides that "the existing county courts are continued, and the judges thereof, in office at the *adoption of this article*, shall hold their offices until the expiration of their respective terms." (*Art. 6, § 15.*) By the same section it is provided that their successors shall be chosen for the term of six years, and further, that "the county court shall have the powers and jurisdiction *they now possess*, until altered by the legislature." What is the meaning of this term "adoption," as here used, and to what period does it relate? Does it relate to the time when the articles should become a part of the constitution of the State, or to a time prior to that, when it could have no voice, or force, or effect whatever, when the electors decided that it should form part of their constitution, and become of force at a future day. To any mind, this is exceedingly clear. The terms used in this section, "the existing county courts," "at the adoption of this article," and "the jurisdiction they now possess," all speak of, and refer to, the same period precisely, to wit, when the sixth article should become of force as part of the organic law. This, it seems to me, is susceptible of demonstration beyond all reasonable doubt. When this article became of force as organic law, has been happily settled by the court of last resort, and is no longer open to question or controversy. Section 5 of article 14 of the constitution, as adopted by the convention, and proposed by that body for adoption by the electors, was as follows: "This constitu-

The People v. Norton.

tion *shall be in force* from and including the first day of January next after its *adoption by the people*, except as herein otherwise provided." The electors rejected every part of the proposed instrument, except the sixth article. They refused to adopt article 14, and every other article except the sixth. And yet it was held that inasmuch as it was provided as part of the instrument, that no part of it should be of force until the first day of January after its adoption by the electors, the electors must be presumed to have intended that the portion they did conclude to adopt should be of force on that day, and not before. (*Real v. The People*, 42 N. Y. 270.)

It is claimed on behalf of the appellant, that it was decided, in that case, that article 6 was adopted when the votes of the electors had been cast, and the result declared by the board of canvassers. But no such thing was determined, and no such question was before the court. All they decided was as to when it became of force, and they refused to give it any retroactive effect. They did not hold that "its adoption by the people," mentioned in section 5 of the rejected article 14, had the same meaning, and referred to the same period, and condition of the instrument, as "the adoption of this article," in the several sections of article 6. As I understand the decision, it is rather the reverse of this. The court certainly held that it was not adopted so as to become a part of the constitution, until the first of January, 1871; and that before that time it had no authoritative voice, or control over the action of the judges, which was regulated and controlled solely by the constitution and laws in force up to that time. Looking at all the provisions of article 6, no one can doubt that the general plan and intention, both of the convention which framed, and of the electors who ratified and accepted, was to have no change in the term of the office, until the incumbent holding such office at the time the article became operative and in force, should have served out the

The People v. Norton.

time for which he was elected; and that every person duly elected and entitled to take office, when such article should become part of the constitution, should take, and hold the same, for the full term which he would be otherwise entitled to hold. No vacancy in any office, under this article, and no interruption in the business of any court, for want of an officer to perform it, was contemplated, but on the other hand was sedulously guarded against. This general intention is expressed in various forms and terms, all referring manifestly to the same point or period of time, to wit, the time when the article should be in force. Thus in section 6, "there shall be the *existing* Supreme Court," "and it shall be composed of the justices *now in office*." This can mean nothing else than the court existing and the justices in office when the article became operative as a rule. It speaks as of that time, and no other. So in section 7, "at the first session of the legislature *after the adoption of this article*," provision was to be made for organizing, in the Supreme Court, not more than four general terms. This clearly refers to the same time, precisely, when the article should be fully adopted as part and parcel of the constitution. This must be so, because, otherwise, and according to the construction contended for on behalf of the relator, this duty might have been devolved upon an extra session of the legislature, which the Governor had authority to call, at any time between the completion of the canvass of the votes of the general election of 1869, and the first day of January, 1870, when article 6, had not become operative, and thus the new machinery put in operation before the provision authorizing it had come to have any force or effect. So in section 12, it is provided that the court of common pleas of the city of New York, the superior court of Buffalo, and the city court of Brooklyn "*are continued, with the powers and jurisdiction they now have,*" &c. The superior court of New York shall be composed of the six judges in office

The People v. Norton.

"*at the adoption of this article,*" &c.; the court of common pleas of New York, of "*the three judges then in office,*" &c.; the superior court of Buffalo, "*of the judges now in office,*" &c. And again, "*the judges of said courts in office at the adoption of this article,*" are continued until the expiration of their terms." Here it is entirely plain that the three forms of expression, "*at the adoption of this article,*" "*then in office,*" and "*now in office,*" are used to express the same idea, and refer to the same period of time—the time when the article should take effect.

The language of section 15 more particularly under consideration has already been quoted, and it is equally plain that the terms there used, "*at the adoption of this article,*" "*the powers and jurisdiction they now possess,*" refer to the same time. "*Now,*" as there used, must be held to mean the time when the article became operative and in force, and could speak with authority. And "*at the adoption of this article,*" refers, undoubtedly, as I think, to the same time, when the article should be fully and completely adopted as a part of the constitution. This interpretation of this last sentence is, it seems to me, placed beyond all doubt or cavil, by reference to section 25, which provides that "*surrogates*" and other inferior officers there mentioned, "*in office when this article shall take effect,*" shall hold their respective offices until the expiration of their terms." In many counties of this State, of which Wayne county is one, the county judge is both judge and surrogate, and holds and exercises the duties and functions belonging and pertaining to both offices. It would lead to a most gross absurdity to hold that the convention, or the electors, intended, by using this phrase, "*shall take effect,*" to divorce the two offices, in a case like the one under consideration, and allow the county judge elect, when the article should "*take effect,*" to hold the office of surrogate through the term, and not the office of judge. Yet such would certainly be the result, upon

The People v. Norton.

the construction contended for by the relator and appellant. The defendant had been duly elected to the office of surrogate by virtue of his election as county judge, and had duly qualified before the article took "effect;" and went into the office at the same moment that such article went into effect. He was therefore in office at that time, or "now in office," as the same idea is elsewhere expressed. Both went in together, and each was therefore necessarily in when the other came in. This seems quite too plain to require the aid of argument. These terms, "when this article shall take effect," are used nowhere else in the judiciary article, and so far as I have been able to discover, nowhere else in the entire instrument, as adopted by the convention and proposed by them for adoption by the people. But the same idea and intention, thus expressed, is expressed very frequently in other forms of expression, both in the judiciary article and in other parts of the instrument as proposed. It is quite competent and proper, when considering the meaning of this word "adoption," as used in the judiciary article, to refer to other articles and sections of the proposed instrument, for the purpose of ascertaining, if possible, in what sense the convention generally used it. I shall not take time to enlarge upon this, but content myself with referring to the same word and term in article 4, sections 4 and 9; article 7, section 6; article 11, section 1, where the same term is used in the same sense, and to express the same idea which the terms "shall take effect," in section 25 of article 6, and "shall be in force," in section 5 of article 14, are used. Indeed such is the primary and natural signification of the word "adoption," as used by lexicographers. It includes both "take effect" and "in force." Thus *Webster* defines "adopt, v. t." "1. To take a stranger into one's family as son or heir; to take one who is not a child and treat him as one. 2. To take and receive as one's own, that which is not naturally so." "Adoption, n.," is

The People v. Norton.

thus defined: "1. The act of adopting, or the state of being adopted; the taking and treating a stranger as one's own child. 2. The receiving as one's own, what is new or not natural." Hence it is seen that the word "adoption," in its primary and most common sense and signification, is a thing consisting of the act of adopting, and its result or effect accomplished. It is no substantive adoption, until the stranger has been taken and become heir. And in this strict and correct sense it was used in the judiciary article in question, by persons who understood the meaning and force of expressions by them used. As the word is used in section 15, and in all other parts of article 6, it is used in its full and complete sense of adoption accomplished. It is not used in any loose or qualified sense, as "adopted by the convention," or "adopted by the people," but "the adoption of this article" in its full sense and significance. It most unquestionably means as there used, "the adoption of this article as part of the constitution." In some sense, it was adopted when the votes were cast, and canvassed and declared, but the adoption then was merely *inchoate* and incomplete.

The electors had decided to discard the former judiciary article in the constitution, and to put the present one in its place at a future day. Time would ripen this into the complete thing—adoption consummate. And it is adoption consummated and completed, and not *inchoate* and imperfect, which the article and section in question speak of. They speak what they mean, of the time when they should take the place of the discarded article, and have the same right and authority. Until then, adoption was not a thing *in esse*; nor could it be, until the stranger had in fact and law become heir. And this is so, not by any loose or strained definition of words, or interpretation of terms, but by giving them their primary and common meaning and force. The interpretation contended for by the relator and appellant is the one that is loose and

The People v. Norton.

strained, and which necessarily wrests words and terms from their true and common meaning.

I conclude, therefore, that there was no vacancy in the office of county judge of Wayne county at the time of the general election of 1870. The office was then filled. The then incumbent had been regularly elected for the term of four years, to the offices of county judge and surrogate, and was entitled to take such offices on the first day of January previous, and did take them. He went into office at the same moment with the adoption of the article, as, and in place of, the former article on the same subject. He entered upon the offices simultaneously with the adoption of the article, and was in at such adoption, and must consequently hold his offices until the expiration of the term for which he was elected.

I have not found it necessary, in the view I have taken, to invoke the aid of any of the rules and canons of interpretation for making the words agree with, and express, the real intention of the law maker, where, in their literal sense and meaning, the words chosen fail to express fully and completely such intention. To my mind the words chosen are most apt and fitting to express the sense and intention of the convention and of the electors, in regard to the time the article should speak with authority.

I do not perceive that the alteration of sections by the convention, or of the phraseology of some of them, brought to our attention by the appellant's counsel, has any significance or bearing whatever upon the question we have been considering. There is nothing to show that any importance was attached to either by the convention in this respect. If it can have any bearing, it would seem to me to be rather against, than in favor of, the appellant's position.

For the foregoing reasons, I have come to the conclusion that the relator and appellant is not entitled to the

The People *v.* Gardner.

office, and that the judgment at special term should be affirmed, with costs to the respondent.

TALCOTT, J., having been elected to the office of justice of the Supreme Court, at the judicial election in 1869, expressed no opinion.

Judgment affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, May 1, 1871. *Mullin*, P. J., and *Johnson and Talcott*, Justices.]

THE PEOPLE, *ex rel.* Cyrus E. Davis, *vs.* HIRAM GARDNER.

The limitation, or prohibition, in respect to age, contained in section 13 of article 6 of the constitution, adopted in 1869, was not intended to apply, and does not apply, to justices and judges in office at the time of the adoption of the judiciary article as part of the constitution, but only to judges or justices appointed or elected under and in pursuance of the said 6th article.

The plan adopted and sought to be carried out by article 6 was to allow every judicial officer, duly elected under the constitution and laws previously existing, to take, and to retain, his office, for the full term for which he had been elected, the same as though no change had been made, in any respect. Accordingly held that the limitation or prohibition in respect to age, in said section 13, did not apply to a county judge who was elected at the general election in November 1869, for the term of four years, to commence on the 1st day of January, 1870, and who, pursuant to said election, entered upon and continued to perform the duties of the office.

THIS is an action in the nature of a *quo warranto*, commenced and prosecuted pursuant to sections 428 to 448 of the Code, to oust the defendant from the office of county judge of Niagara county, and to install the relator into the office.

The action was tried by the court without a jury, (a trial by jury having been waived by consent of the respective parties,) at a circuit held before Justice MARVIN,

The People v. Gardner.

in Niagara county, in February, 1871; and the court having heard the proofs and allegations of the parties, respectively, found the following facts as proved:

That on November 17, 1868, the defendant was duly appointed by the Governor of this State, county judge of Niagara county, to supply a vacancy caused by the resignation of Hon. George D. Lamont, who, at the general election of 1865, was elected county judge of said county, and whose official term would not have expired until December 31, 1869.

That at the general election held in said county, in November 1869, the defendant was duly elected county judge of said county, for the term of four years, commencing on January 1, 1870. That notices of such election, and that a county judge of said county would be elected thereat, were duly and within the time prescribed by law, given and published by the proper officers, and as the law directs; and at which election the defendant received a majority of all the votes given by qualified electors for county judge at that election in said county; which votes were duly counted, estimated and canvassed, and statements thereof duly made and certified, and returned, and by the proper officers, to the county board of canvassers of said county, as prescribed by law; and said county board of canvassers at the meeting thereof, held pursuant to law on November 9, 1869, did estimate the said votes given in said county for county judge, and did make statements thereof as required by law, and which were on the same day certified and attested and filed as the law directs, and by which it appeared that the defendant was duly elected such county judge, for said term of four years, and said county board of canvassers on the same day so decided, declared and certified.

That after such election, the defendant entered upon the discharge of the duties of such judge, and took possession of said office within the time prescribed by law,

The People v. Gardner.

and took and subscribed the oath of office prescribed by law to be taken by a county judge and before the proper officer, and deposited the same in the clerk's office of said county within the time prescribed by law; and has ever since discharged the duties of said office and yet continues to do so.

That the defendant became seventy years of age on February 9, 1870; which fact was well known to him, and also to many of his neighbors, and electors in the city of Lockport, his place of his residence.

That a general election throughout the State of New York was held on November 8, 1870, for the election of various State and county officers, to be elected at that election. That the Secretary of State gave due notice of that election, but neither he nor any other officer, either State or local, gave any notice that a county judge was to be elected in Niagara county at such election. That at said election, ballots in the form following:

“Judiciary.

For County Judge,

Cyrus E. Davis.”

and one in the same form except that the name “Hiram Gardner” was thereon in place of “Cyrus E. Davis,” were given and cast by electors of said county for county judge, were received by the inspectors of election, and deposited in boxes by themselves, and were correctly counted and estimated by the inspectors of election, in all the election districts where such ballots were cast, in the form prescribed by law.

That for said office of county judge of said county, the whole number of votes given by qualified electors of said county, at such election, was 2841, of which 2840 were for Cyrus E. Davis, and one for Hiram Gardner.

That Cyrus E. Davis received the greatest number of votes cast for any person for county judge at such election.

That the county board of canvassers refused to estimate

The People v. Gardner.

such votes, or declare or certify that said Cyrus E. Davis was elected county judge of said county.

That the said certificates of the inspectors of election, in all the election districts in said county, where any such votes were cast, were filed in the office of the clerk of said county, before the meeting of said county board of canvassers, and have remained on file there ever since; and which certificates certified that the whole number of votes so cast for county judge, in those election districts where any were cast, was 2841; of which 2840 were cast for Cyrus E. Davis, and one for Hiram Gardner.

That thereupon and within the time prescribed by law, said Cyrus E. Davis duly took and subscribed the oath of office by law prescribed to be taken by a county judge, and before the proper officer, and duly deposited the same in the office of the county clerk of Niagara county; and within the time prescribed by law, did also make and sign a certificate, stating his age and the time when his official term as such judge would expire by effluxion of a full term, and filed the same in the office of the Secretary of State.

That at and for a year prior to said election in 1870, the electors in said county were divided into two, and only two political parties, to wit, the democratic and republican parties; and a county convention was held by each of said parties to nominate county officers to be voted for at such election, the convention of the republican party being held on September 10, 1870, and that of the democratic party on October 1, 1870; at each of which, county officers to be voted for at said election were nominated; but that no candidate for county judge of said county was nominated by either of said conventions, nor by any other convention held prior to said election, nor otherwise except as herein after stated.

That for a year prior to said election, there were three and only three public newspapers published in said county,

• The People v. Gardner.

(two of which were published daily,) and in neither of which was there any notice or information given or published that a county judge was to or would be elected or voted for at said election.

That a majority of the democratic county committee of said county (which committee was composed of sixteen members) met on Saturday, November 5, 1870, and resolved that a ticket for county judge should be issued, and that Cyrus E. Davis should be the democratic candidate; and a circular was issued on Monday, November 7, 1870, recommending to the democratic electors of said county to vote at said election for Cyrus E. Davis for county judge; and that the same was sent to the several election districts of said county with the democratic ballots for State and county officers, and to be delivered to the persons to whom such ballots were sent; said Cyrus E. Davis, being a member of said committee, and present at said meeting, and no one but members of said committee being present. That such circulars were printed in letter form, on said November 7, 1870, dated that day, and so sent inclosed, together with said ballots, in wrappers, by confidential agents, and in such form and manner that the same did not become publicly known until the morning of the day of said election, and then was known generally only to electors belonging to said democratic party, and no other publicity was given to the same; and that no other action was taken relative to an election of county judge in said county, at that election, nor any other notice thereof given, than above stated.

That the average number of votes given at said election in said county for State officers, respectively, was 9122, and the average number of votes so then given for county officers severally, other than county judge, was 9111.

And as conclusions of law from the foregoing facts, the court found and decided: that at the general election held in said county of Niagara in November, 1869, the defend-

The People v. Gardner. •

ant was duly elected county judge of said county for the term of four years, commencing on January 1, 1870; and that he duly qualified as such judge and entered upon the duties of said office; and thereby became and was, and now is, lawfully and rightfully entitled to have and to hold said office, and to discharge the duties, and receive and enjoy the emoluments thereof until the expiration of said term of four years; and that his said term of office has not expired; nor has the defendant become incapable of holding said office under said election by reason of his having become seventy years of age on said February 9, 1870; and that no county judge could lawfully be elected in said county at the election so held therein, in 1870; and that Cyrus E. Davis was not elected county judge of said county, at said election, so held therein, in 1870, and is not entitled to have or hold said office or discharge the duties or receive or enjoy the emoluments thereof, for any term whatever; and judgment was directed accordingly.

The following opinion was delivered by the justice before whom the action was tried.

MARVIN, J. At the general election held in November, 1869, the electors of the State adopted a substitute for the sixth article of the constitution of 1846, to go into effect on the 1st day of January, 1870. It is known as the judiciary article.

By the 15th section it is declared that "The existing county courts are continued, and the judges thereof in office at the adoption of this article, shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years." In section 13 it is declared, "But no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." As this section and the previous sections relate to courts other

. The People v. Gardner.

than county courts, and as there is nothing said in section 15 relating to county courts, touching the age of the incumbent of the office, it has been suggested that the limitation by age has no application to county judges. I think the language "justice or judge of *any court*," is too clear to justify any doubt as to intention. I think it includes county judges.

The decision in this case must depend upon the construction to be given to the language used in the 15th section, as above quoted, in connection with the facts of the case.

There was no vital force in this article, until the 1st day of January, 1870, and article 6 of the constitution of 1846 was in full force up to the moment when it was superseded by this new judiciary article. By section 14 of article 6 of the constitution of 1846, it is declared that "there shall be elected in each of the counties of the State, except the city and county of New York, one county judge who shall hold his office for four years." It was under this provision of the constitution of 1846, and the statutes relating to the subject, that the electors of Niagara county proceeded at the general election of 1869, and elected the defendant a county judge, for four years; the term to commence on the 1st day of January following. Was the defendant "in office" within the meaning of the new judiciary article at the time it became the fundamental law? All language in constitutions, statutes and other instruments is used in reference to some subject matter, and it is always to receive a fair construction with the view of effectuating the intention of the body or person employing the language.

It was not intended by the new judiciary article to overthrow or disturb what had been lawfully done under and in pursuance of the constitution and laws previously existing. It is not doubted that the defendant was lawfully elected at the election in November, 1869, but the claim is that he

The People v. Gardner.

was not "in office" under that election until the new judiciary article was adopted, and that the provision relating to age is applicable to him, and that his term expired on the 31st day of December, 1870. It is suggested that the new judiciary article was "adopted" when the State canvassers had completed their canvass of the votes. Undoubtedly the electors had adopted the article. They had done all that they were authorized, by law, to do; but the article was not to become law until a future day. Until that time arrived it was silent, and affected no one. *Real v. The People*, (42 N. Y. 270,) and *Richter v. Poppenhausen*, (*id.* 373,) are in point. It may be conceded that the term for which the defendant was elected (four years) did not commence until January 1, 1870, and it will not necessarily follow that the defendant was not "in office," by virtue of his election, within the meaning of the new judiciary article, prior to the 1st day of January, when his term of office commenced. He was certainly elected. His election was fully accomplished when the county canvassers had completed the canvass.

He had a right, on receiving notice of his election, to take and file the oath of office. (1 R. S. p. 119, § 21.) He is, in the statute, styled an officer. He may take the oath of office within fifteen days after the commencement of his term of office. (*Id.*) Here the statute distinguishes between "the officer" and "his term of office." In short, by turning to this "article third," "of oath of office, and official bond," (1 R. S. 118,) it will be seen that the persons elected or appointed to any civil office or public trust embraced in the chapter, are mentioned as officers; they are referred to by the title of the office to which they have been elected or appointed, as the Governor, Chancellor, Justices of the Supreme Court, Justices of the Peace, &c. "All officers elected by the people * * * shall enter on the duties of their respective offices on the 1st day of

The People v. Gardner.

January, following the election at which they shall be chosen." (1 R. S. p. 116, § 3.) Here we have the time specified when the "officer elected" shall enter on the duties of his office. The person elected is, by the statute, recognized as an officer in office.

Now I have thus referred to the language used in statutes as some guide or aid in ascertaining the sense in which the words in the new judiciary article were used—the judges "*in office* at the adoption of this article." In my opinion the defendant was, in contemplation of the new judiciary article, *in office* when that article was adopted—became law. The point made by the relator is very sharp and technical, and, if it is to prevail, then the action of the electors at the election in 1869 is to be annulled. As I have already said, the electors were authorized to do all they did do; and more, it was their duty to do what they did. The constitution of 1846 was in full force, requiring them to elect a county judge for four years. They had no authority to elect for a longer term. They had authority to elect a person of any age above majority. They could have elected one whose age, at the time of the election, was more than seventy. What then? Such person, I suppose, could have taken the oath of office, but "the last day of December next after he shall be seventy years of age," would have come before the term of office would commence, and the county would be without a judge. Nothing of the kind was contemplated by the convention; but it was intended to preserve all that had been lawfully done in the way of filling the office of county judge, and the language used, "*in office*," was general, and fitly chosen, in view of language that had been used in the statutes, to which I have referred, and, in common parlance, to include the case when one had been lawfully and properly elected. It is not said the judges whose terms of office have commenced shall hold their offices until the expiration of their

The People v. Gardner.

official terms. But if we should be driven to the precise point made by the relator, how would the case then stand? It is claimed that the defendant was not in office until his term of office commenced, and that this was the first day of January, 1870, the day when the new judiciary article came into effect, containing the provision touching the age of justices and judges of any court.

Can it be asserted that there was any moment of time, when this new judiciary article was in force, that the defendant was not in office? Clearly not. The most that can be claimed is that the commencement of the term of office, and the beginning of the authority of the new constitutional article were simultaneous. It may then, I think, be safely averred that the official term of the defendant commenced at the time the constitutional provision became operative. And if it is necessary to hold that he was not in office until the term of office commenced, it may be safely held that he was in office when the new constitution came into effect. But these views or suggestions, in my own opinion, have relation to a question quite too narrow. The case has a broader base. The rights of the defendant are to be found in the constitution of 1846, as continued in the new constitutional judiciary article. It was not intended to interfere with any right acquired to the office of county judge, prior to the coming into effect of the new judiciary article, and the provisions, therefore, in section 13 of the article relating to age can have no application to this case. It can be applied only to judges or justices who are appointed or elected under and in pursuance of the new constitutional article.

There must be judgment for the defendant.

Judgment accordingly.

Judgment being entered, the plaintiffs appealed to the general term.

The People v. Gardner.

Marshall B. Champlain, (Att'y Gen.,) for the appellants.

I. The defendant was elected in November, 1869, to fill the vacancy left by Judge Lamont; which term expired on the 31st of December, 1869. Is there any provision of law under which he could have been elected for a full term? Section 8 of the general election law directs that the "vacancy" shall be supplied at the next election after the happening thereof. This was a "vacancy"—not an "expiration of term." The statute (*tit. 6, § 34*) declares and defines what are "vacancies"—such as "death, resignation, removal," &c.

II. If the defendant was elected for a full term, then the constitutional limitation of age applies; and his term expired on the 31st day of December, 1870. (*Const. art. 6, § 13*.) 1. The limitation applies to county judges. The prohibition in section 13 means exactly what it says—that "no person shall hold the office of justice or judge of any court" beyond the time there mentioned. The language is clearly not intended to be confined to the justices and judges before mentioned. If that had been intended, it would have been expressed. If the words "of any court" had been omitted, it would have been barely possible to limit the prohibition to the justices and judges before mentioned; but with those words, it cannot be so limited. In short, it is an absolute prohibition—so clear, so plain, so positive in its terms, so significant of its intent, and so imperious in its character, that it cannot be disregarded. The object of the language employed was to make the prohibition cover the judges of every court; and such is clearly the legal effect. The reason of the prohibition applies equally in every case. The necessity, or supposed necessity, for the prohibition, applies as well to the judges of one court as to those of another. The prohibition applies to judges of any court; and necessarily, to county judges. Section 13 has also received a legislative construction, to this effect, in the act of March, 1870, requir-

The People v. Gardner.

ing county judges to file certificates of age. As the learned judge before whom this cause was tried, in his opinion, concedes this point, it will not be further considered.

2. But it is claimed that the defendant can hold under the following provision of section 15 of the judiciary article: "The existing county courts are continued, and the judges thereof *in office* at the *adoption* of this article, shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years." Now the article was, in point of fact, to be submitted to the people for their "adoption," or rejection, on the day of the general election in November, 1869, and it was then either adopted or rejected. It was in this sense that the term "adoption" was used in section 15; it is the literal as well as the liberal sense; the term was used with reference to its ordinary meaning and popular application. But, in the most technical sense, the article was certainly adopted when the State canvass was completed, in December, 1869. (*Real v. The People*, 42 N. Y. 270.) In any point of view, therefore, the defendant was "in office" under his appointment, and not under his election, at the "adoption" of the article. He was not "in office" under both at the same time. A person may be elected *to* office and not be *in* office. He does not go "into office" until his official term commences, and is "in office" thereafter, and not before. Where a term is four years, can one be said to be "in office" longer than the four years? An officer elect may be called an officer in the statutes, but nevertheless he is not in any sense "in office" until his term actually commences. One person may be elected *to* an office, while another, at the same time, is *holding* it, and is actually "in office." Section 15 had reference to judges holding office and "in office" at the time of its adoption. The defendant was elected at the same time the article was adopted by the votes of the people, and went "into office" at the same

The People v. Gardner.

time the article went into effect. Did he go "into office" and hold office under the constitution "as it was," or under the constitution "as it is?" If the defendant was elected for six years, he was still "in office" under his appointment at the adoption of the article; and as a "successor" to himself, was elected for six years under the provisions of the new article, and holding under the new article, the limitation of age necessarily applies.

If it should be held, however, that the defendant was "in office" under his election instead of his appointment, when the article was adopted, still the limitation of age applies. Nothing can be clearer than the meaning and intent of section 15. "The existing county courts" were "continued," additional jurisdiction was conferred upon them, the judges were to hold six years; but the judges in office at the adoption of the article were to hold only "until the expiration of their respective terms;" that is, the four years terms; they should not hold the six years terms; and the constitutional prohibition should apply to both the judges of four years terms and six years terms—to the judges then in office, and thereafter to be in office; the prohibition is absolute, and takes effect immediately; "but no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." The reason and spirit of the prohibition, as well as its express words, apply equally to judges of any term, and judges of any court. The only sound and sensible construction that can be placed upon the prohibition is simply this: the limitation of seventy years applies, without any reference to the question as to how or when the incumbent obtained the office; the prohibition is an absolute one under all circumstances, subject to no exceptions, reservations, conditions or restrictions whatever, and the constitutional limit is reached, and the "expiration of their respective terms" has been arrived at; on the 31st of De-

The People *v.* Gardner.

ember next after the incumbent has become seventy years of age. If the expression in section 15, "shall hold their offices until the expiration of their respective terms," gives the full term of four years without reference to age, then the next clause, that "their successors shall be chosen for the term of six years," would have the same effect; and together, with that interpretation, they would nullify the prohibition in section 13 entirely, as to county judges. It cannot be that such interpretation is admissible. Section 15 must be construed in connection with section 13, and both sections will then be consistent and harmonious, while full force and effect will be given to each. No plainer argument can be used than the plain text itself: "The existing county courts are continued, and the judges thereof in office at the adoption of this article, shall hold their offices until the expiration of their respective terms. But no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age."

The learned judge before whom this case was tried, in his opinion, places his decision wholly upon the question whether the defendant was "in office" under his election at the time the judiciary article took effect, and not at the time of its "adoption," as mentioned in section 15. The question, as to either time, however, is wholly immaterial in the view of the case here presented. The learned counsel for the defense will not permit themselves to look at more than one section of the article, and that is the one under which they would continue the defendant in office. The learned judge seems to have fallen into the same error. They will not rise to the contemplation of both sections together, giving force and effect to each, consistency to both, and harmony to the whole.

The learned judge, in his opinion, says that the prohibition would annul the defendant's election. Not at all. It was competent, however, for the constitution to have

The People v. Gardner.

swept away both county courts and county judges; but it did not; it continued them, fixing and qualifying, however, their terms of office; and prohibiting them, in common with all other judges, from holding longer than until the close of the political year next after they should become seventy years of age. But, says the learned judge, "they could have elected one whose age at the time of the election was more than seventy; what then? * * * The county would be without a judge." The people knew when the constitution was submitted to them that it contained this prohibition. It is absurd to suppose that both parties would have attempted to elect persons who were wholly ineligible by virtue of its provisions. The Governor, however, could give the county a judge by appointment, if we must suppose such a case. The learned judge, having reference to the election of the defendant, in his opinion, further states that "It was not intended by the new judiciary article to overthrow or disturb what had been lawfully done, under and in pursuance of the constitution and laws previously existing." Now "the new judiciary article" not only "intended to," but actually did "overthrow and disturb" the late Court of Appeals, and the judges thereof "lawfully elected thereto, under and in pursuance of the constitution and laws previously existing;" other courts and judges were also "disturbed." It was absolutely intended by the new judiciary article, and such was its constitutional mission, as a part of the organic law, to change the judicial system theretofore lawfully existing, and substitute one of its own, and courts and judges were to derive their existence, and all their rights and powers, from it alone; and be subject, also, to all its provisions, restrictions and prohibitions. We have no other judicial system. One of the peculiar features of the system is that no one is permitted to hold the office of a judge of any court beyond a certain age. Whether the prohibition is wise or unwise, it is not for us to discuss; we must take

The People v. Gardner.

and interpret the law as we find it, and not as we would have it. It is the solemn compact of the whole people, to which all have assented, including the defendant. It is the constitution itself. Its language is so simple and well understood, so clear and certain, so plain, positive and absolute, that no court can disregard it, or turn aside that full meaning which the words themselves express.

III. The relator was regularly and legally elected. 1. If the defendant's term expired on the 31st of December, 1870, then there *was* a county judge to be elected in his place; and the people had a right to elect his "successor" at the preceding general election, to fill the office for the political year to commence on the 1st of January, 1871, and for such term as the law prescribed. This is not a case of vacancy, but an expiration of term. It is not one of the cases of vacancy mentioned in the statute, where vacancies are defined. (§ 34.) If it had been intended to be left to operate as a vacancy, the limitation of the term would have been at just seventy, whenever that might happen; but it is expressly provided that the incumbent shall hold until the last day of December next thereafter, so that the term shall regularly expire at the close of the political year, and thus enable the people to elect a "successor" at the preceding general election. The object of the statute requiring certificates of age to be filed with the Secretary of State, is for the same purpose. The exception of county judges, in the act of March, 1870, in regard to elections, only shows the looseness of legislative enactments. It is meaningless, and does no harm. It has reference to expiration of term, not only by reason of age, but by effluxion of a full term. It does not say they shall not be elected at the preceding election, but makes no provision that they shall. County judges are, therefore, left to the provisions of the previously existing election law. The same law (for it has not been repealed) under which the successors of every county judge have

The People v. Gardner.

heretofore been elected at the preceding general election, will warrant their election now. Section 1 of the general election law provides who shall be elected at the annual general election, and among others, county judges; and section 15 of the new judiciary article of the constitution provides and commands that "their successors shall be chosen by the electors of the counties, for the term of six years." The statute also makes provision for the holding of elections to fill the various offices of the incumbents whose terms will expire at the close of the political year. If the ground taken by the defense is correct, a county judge can never be elected except in case of a vacancy by death, resignation or removal. This is simply absurd. It would actually result in the alternate election and appointment of such officers.

2. If the defendant's term expired at the close of the political year, so that there was a county judge to be elected in his place, then the election was valid, whether any notice was given by any public officer or not. The case of the *People v. Cowles*, (3 Kern. 350,) is conclusive on this point. There is nothing in this case which takes it out of the principle on which Cowles' case was decided. Johnson, J., there says, (p. 359,) "even where notice is prescribed, no one supposes that the omission to give it will vitiate the election." Even Wright, J., dissenting, puts it upon the ground of a sudden vacancy, and not an expiration of term with the political year; in which case, he says, the electors are presumed and bound to know the law, and when the term will expire, and act accordingly; that notice in such case is probably not necessary. Here the defendant's age was known for nearly a year previous, and discussed by both parties, and by his political friends before their convention. They took their stand upon it with full knowledge. The fact upon which depended the question of expiration of term, to wit, the defendant's age, was well known, even if the political nomination of the

The People v. Gardner.

relator was not; knowledge of the latter was not essential, when they already knew the former. There is no rule of ethics, much less of law, that requires one political party to inform the other of its movements; and a want of such knowledge will not vitiate an election. If the defendant and his friends committed an error in not making a nomination, when they had full and early knowledge of the fact upon which depended the question of expiration of term, it will hardly vitiate the election, either. It is believed, however, that these political considerations have nothing to do with the questions of law involved in the case, and ought not to have gone into any finding of facts; they are noticed simply because they are in.

3. "It is the election, and not the certificate of the canvassers, that gives the right to an office." (*See People v. Cook, 4 Seld. 67, and cases there cited.*)

As the learned judge before whom this cause was tried, makes no question as to the election of the relator, but puts his decision, in his opinion, wholly upon another ground; and, in fact, concedes the regularity of the election, the point will not be further extended.

M. M. Southworth and *L. F. Bowen*, for the respondent.

The case presents two principal questions: (1.) Is the defendant entitled to the office, and if not, then (2.) Is the relator entitled to it.

First. We claim that the defendant is clearly entitled to the office.

I. The defendant having been duly elected to the office in 1869, for the term of four years, commencing January 1, 1870, and having duly qualified, he was, in the language of section 15 of the new judiciary article, which took effect that day, "in office at the adoption of" that article, and consequently by the same section he was continued in office until the expiration of the term for which he was elected. 1. The term, "at the adoption of this

The People v. Gardner.

article" in that section, is most evidently used as synonymous with the terms, "now in office," and "in office when this article takes effect," used in different sections of the same article; thus, by section 6, the Supreme Court shall consist of the justices "now in office," who shall be continued during their respective terms and their successors, &c. By section 12 (which relates exclusively to city courts) the superior court of New York shall be composed of the six judges "in office at the adoption of this article, and their successors;" the court of common pleas, of the judges "then in office;" the superior court of Buffalo of the judges "now in office" and "the judges of said courts" (meaning of all the city courts) "in office at the adoption of this article," are continued until the expiration of their terms. By section 2, of article 14 of the proposed amended constitution, it is provided that "existing officers and the terms of persons in office shall continue," &c. In regard to continuing persons in office, no distinction was intended between the different officers referred to. It would be absurd to conclude otherwise. These different terms used, as applied to the different officers, all refer to the time when the article took effect; when it was adopted as operative, as an existing part of the constitution, and when that took place, the defendant was, in the language of section 15, "in office." The defendant's term of office under his election, commenced at the same moment that the judiciary article took effect; there was not a particle of time that the article was in force when the defendant was not in office.

2. But if the words "at the adoption," in section 15 means when the article was ratified by the election in 1869, then the "adoption" was not complete until the State canvass in December 1869, (*Real v. The People*, 41 N. Y. 270,) and the defendant's election was completed by the county canvass on November 9, 1869. The county canvass must necessarily precede the State canvass, as the

The People v. Gardner.

State canvassers pass upon the returns of the county canvassers. (1 *R. S.* 436-441, 5th ed.) When the county canvass was complete, the defendant was elected to the office; was then in office; was judge elect. The constitution (*art.* 12, § 1) prescribing the oath of office to be taken by all officers, treats those elected to office, as in office before they are authorized to discharge the duties thereof, and the same is the case with various statutes.

3. It appears evident from the whole article taken together, that the intention was to continue, without interruption, the courts in existence, and the judges thereof in office, when the article took effect; that the title to and terms of the office of judges elected before the article took effect should not be disturbed or interfered with. Thus, "there shall be the existing Supreme Court," * * "and it shall be composed of the judges now in office," * * "and their successors." Section 6. The superior court, (and the other city courts,) "are continued," and are to be composed of the judges "now in office," * * "and their successors." Section 12. "The existing county courts are continued, and the judges thereof in office at the adoption of this article, shall hold," * * "and their successors shall be elected," &c. (*Sec.* 15.) Now, if the defendant was not "in office at the adoption," &c., certainly no one else was, and consequently there can be no successor; and as there is no provision for the election of any county judge except a successor of those in office at the adoption of the article, we never can have a county judge. At all events, we had no judge in 1870, and could have had none. No such absurdity could have been intended.

4. The defendant was not elected to fill a vacancy. County judges were always elected for a full term; and besides, Judge Lamont's term, to fill out which the defendant was appointed by the Governor, expired December 31, 1869, and consequently the defendant was elected

The People *v.* Gardner.

for a full term of four years, commencing when Judge Lamont's term would have expired.

II. The office of county judge did not become vacant by reason of the defendant having become 70 years of age on February 9, 1870. 1. It is suggested that the disability of age, created by the last clause of section 13, does not apply to county judges. The provisions of section 13, preceding this last clause, and of the whole of section 12, referred to in section 13, relate exclusively to judges of city courts and justices of the Supreme Court; and although the language of the clause creating the disability is general, it should not be extended to include officers not previously referred to. A county court or county judge is not previously mentioned in the article. It will not be claimed that the disability applies to members of the court for the trial of impeachments, composed of the president of the senate, (Lieutenant Governor,) senators and judges of the Court of Appeals. (*Art. 6, § 1.*) And yet the members of that court are, in every sense of the word, "judges." If the clause of section 13 creating the disability is to have the broad application contended for, it will include not only the Lieutenant Governor and senators, but justices of the peace, justices of sessions, surrogates, judges of inferior courts of cities and villages, &c. The judges referred to in sections 12 and 13 are to hold office fourteen years, and county judges six years. There is, therefore, not the same reason for applying the restriction to the latter as the former.

III. But, it is insisted that this limitation of age does not apply to county judges in office when the judiciary article took effect, or was adopted. 1. The provision creating the limitation is general, while the provision as to continuing the judges in office, at the adoption of the article, is restricted in its application. If the two provisions are in conflict, then the one which is restricted in its application must prevail. The two provisions should be

The People v. Gardner.

read together, and when so read, their meaning will be obvious. "No person shall hold the office of justice or judge * * after he shall be 70 years of age; * * but those in office * * * shall hold until the expiration of their terms." It is a rule of universal application, that all parts of a law are to be construed together, and to receive such interpretation as to enable every clause to be operative. If the relator's construction is to be adopted, then all judges and justices in office at the time when the article took effect, and who were then over 70, were absolutely excluded; and as to them, the provision continuing them in office was absolutely nugatory, and could have no operation. (It is understood that more than one justice of the Supreme Court is in that very predicament.) Again; as before stated, on reading the whole constitution, as well as the other parts in the judiciary article, the intention, (with a few exceptions especially provided for,) to continue the existing state of things, especially with regard to officers then in office, and the terms of office of the incumbents, is perfectly obvious. That intention pervades the whole instrument, and it is a well established rule of construction that the intent of the lawgiver must always prevail over the literal sense of the terms employed. (1 *Kent's Com.* 431.) With certain exceptions above referred to, all justices and judges whose election is not provided for by the judiciary article, were to be elected as successors to those in office when it took effect, and on the expiration of their respective terms. (§§. 6, 12, 13.) The 8th section of the act of March 22, 1870, (*Sess. Laws of 1870, vol. 1, p. 291,*) is not a legislative construction of the clause of the constitution in question, favoring the relator, but the contrary; for although that section requires county judges to file certificates stating their ages, respectively, yet it is restricted to those elected thereafter; that is, after March 22, 1870, while the defendant was elected in 1869, and is thus expressly excepted from

The People v. Gardner.

its operation; and while all the judges of the Court of Appeals, whenever elected, are included, the inference is irresistible, that the legislature did not consider that judges previously elected came within the restriction; otherwise, they would have all judges, whenever elected, to make the certificate, as the reason for applying it in the one case, applied equally in the others. And again; section 9 of the same act provides for the election of judges and justices as successors of those whose terms expire either by "effluxion of time, or disability of age," but expressly excepts county judges; so that as to county judges, there is no provision for their election, except those statutes previously enacted.

Second. Should it be held that the defendant's term of office has expired, yet the relator is not entitled to the office.

I. No election of county judge could be had in 1870.

1. The defendant was duly elected under the constitution of 1846, for four years, which would not expire until December 31, 1873, and if by disability of age, his office expired on December 31, 1870, yet there was no law authorizing an election in 1870. The only law providing for filling the vacancy, is the act of May 8, 1847, (*Sess. Laws of 1847, vol. 1, p. 264, § 6,*) and that act provides that the vacancy "shall be supplied at the general election next succeeding the happening thereof." The defendant was rightfully in office until January 1, 1871, consequently no vacancy existed when the relator claims he was elected.
2. The expiration of the full term of an office, the death of an incumbent, his removal from the State, &c., or his removal from office for misconduct, are all matters of public notoriety, and of which the public are bound to take notice; but an individual's age is known to but few; is a matter of which the public cannot know, and is to be ascertained by proof. Suppose the defendant did not admit he was 70 in 1869, and yet a few, say half a dozen

The People v. Gardner.

electors, knowing or believing he was 70, vote for a successor, is it to be tolerated that a successor could be thus elected? And yet the relator must so claim.

II. The election of the relator was invalid, by reason of the total failure to publish or give notice thereof.

1. The theory of our elective system is, that the majority of the electors shall designate, or elect the persons, or officers, who shall administer the affairs of government, such choice to be made at certain times, and in certain places convenient to the electors; and to render it absolutely certain that every elector shall know, not only the time and place, when and where the election is to be held, but the particular offices to fill which he may vote, the law requires the Secretary of State to transmit to a county officer of each county, a notice specifying, among other things, the offices to be filled at the next election, (1 R. S. 420, 421, §§ 1-5, 5th ed.,) and such county officer is to have the notice published in every newspaper in his county, weekly, until the election, and to deliver copies thereof to officers of each town and city in the county. (1 R. S. 422, § 14, 5th ed.) In this case there was an entire failure to give any notice. In fact, not one in ten of the electors of one political party, had the least intimation that a judge was to be, or could be, elected. To treat what was done in this case as a valid election, would be a mockery of the elective system. In *Real v. The People*, (*supra*,) it is held that the canvass of the votes given at an election is a part of the election; that the canvass is necessary to complete the election, and much more should the giving the notice be regarded a necessary part thereof. Is not the giving the notices a condition precedent to the election, the same as the giving of notice to the members of any official body, of a meeting of that body, is a condition precedent to such meeting? With regard to filling, by election, vacancies created otherwise than by expiration of the term of office, the statute requires them

The People v. Gardner.

to be filled at the next general election after the happening thereof. But with regard to electing a successor after the expiration of a full term, there is no such requisition. The only statute provision relating thereto, is a direction to the Secretary of State to transmit notices thereof to the county officers, and to those officers to publish the same, &c., (1 *R. S.* 421, § 2, and 422, § 14, 5th ed.,) and the election follows pursuant to the notice. The notice is thus made the warrant for the election. If, therefore, as claimed by the relator, the defendant's constitutional term of office expired on December 31, 1870, by reason of disability of age, yet the election of the relator was invalid, for want of the notices. The notices are, however, equally necessary in cases of elections to fill vacancies. (1 *R. S.* 421, § 3, 5th ed.) It is submitted that the case of *The People v. Cowles*, (13 *N. Y.* 350,) is not an authority showing that such notices are not necessary. In that case a vacancy had been created in the office of a justice of the Supreme Court by the death of the incumbent, a matter of public notoriety, and the constitution (*Const. of 1846*, art. 6, § 13) required that it should be filled at the next general election of judges, and the election was held under that provision which prescribed the time of the election. But, with regard to county judges, there was no such constitutional command. The only constitutional provision on that subject was the general one contained in section 5, article 10, now in force, which directs the legislature to provide for filling vacancies, and the only legislative provision is the act of 1847 above referred to.

By the Court, JOHNSON, J. The opinion just given in the case of *The People ex. rel. Clark v. Norton*,^(a) covers all the points in this case, and if correct, is decisive of it; except the question of the age of the defendant. The defendant became of the age of seventy years, in February, after he

(a) *Ante*, p. 169.

The People v. Gardner.

entered upon the duties of his office, and it is insisted that he is prohibited from holding and continuing in the office after the last day of December, 1870, by the provisions of section 13 of the new judiciary article, and that the office has therefore become vacant, by virtue and force of this provision of the fundamental law.

The language of this provision is as follows: "But no person shall hold the office of justice, or judge, of any court, longer than until and including the last day of December next after he shall be seventy years of age."

This language is certainly sufficiently broad and comprehensive to produce the result contended for, and would be conclusive against the defendant, but for other provisions in the same article. By section 15 it is provided that the existing county courts shall be continued, "and the judges thereof in office at the adoption of this article shall hold their offices until the expiration of their respective terms." And by section 12, relating to the New York Common Pleas, the Superior Court of Buffalo, the City Court of Brooklyn and the Superior Court of New York, it is provided that "the judges of said courts in office at the adoption of this article are continued until the expiration of their terms." And so, also, section 6 provides that the existing Supreme Court "shall be composed of the justices now in office, who shall be continued during their respective terms." The language used in these sections is equally broad and unqualified with that used in section 13. In regard to each court therein specified, the provision is that the judge or justice in office at the adoption of that article, shall hold until the expiration of his term, without respect to age or any other circumstance or condition. The provisions of section 13 on their face appear to be incompatible with those of the other three sections referred to, and if all are to be literally interpreted, they cannot stand together, and all be carried out according to their respective terms. But there is, in truth, no

The People v. Gardner.

such difficulty. By applying each provision to its proper subject matter, with which it stands in connection, the whole apparent difficulty is at once solved, and each provision becomes consistent with the other, and all may stand and be carried out.

I am clearly of the opinion that the limitation or prohibition in respect to age in section 13, was not intended to apply, and does not apply, to justices and judges in office at the adoption of the judiciary article as part of the constitution. By applying the familiar principle of construction embodied in the maxim *noscitur a sociis*, by which the meaning of a word or term may be known by reference to the neighboring words, this is rendered entirely clear. A familiar instance of limiting the application of general words, upon this principle, is found in the case of *Chapman v. Forsyth*, (2 How. U. S. 202,) in giving construction to a former bankrupt act of congress. The act prohibited the discharge of bankrupts from debts created by defalcation as a public officer, executor, administrator, guardian or trustee, or "while acting in any other fiduciary capacity." It was argued that these general terms embraced all other cases of trust besides those specifically enumerated. But the court held that the classes of trusts enumerated being all special trusts, and the general words, having been used in connection with them, could not be extended so as to embrace all trusts of every grade and class, but must be confined to all other trusts belonging to the same class with those enumerated. Many other cases might be cited, of the same character, but this is sufficient to illustrate the principle.

This limits the application of the general words, "no person," in section 13, to the class of justices and judges previously enumerated in the same section. The other sections, before referred to, provide for a different class of justices and judges, who are to hold out the terms for which they were elected. But section 13 creates a new

The People v. Gardner.

class holding for a much longer term. After providing for the manner in which they shall be chosen, the section goes on to provide that "the official terms of the said justices and judges who shall be elected after the adoption of this article, shall be fourteen years from and including the 1st day of January next after their election." Then follows the provision in question: "But no person shall hold the office of justice or judge," &c., as before cited. This provision being associated in the same section with the provision for a new class of judges, to be elected after the adoption of the new article, with terms greatly extended, must be held to apply to that class, and no others. It is to be construed as though it had read, "no person so elected." This is plainly what was intended; and any other construction would not only defeat the intention of the framers of the instrument, and of the electors, but would abrogate other provisions in other sections, of a contrary character, equally positive and absolute in terms with the one in question. Looking carefully at all the provisions of article 6, no one, as it seems to me, can reasonably doubt that the plan adopted and sought to be carried out, was to allow every judicial officer, duly elected under the constitution and laws previously existing, to take and retain his office for the full term for which he had been elected, the same as though no change had been made in any respect. This construction renders each seemingly conflicting provision consistent with the other, and produces a congruous and harmonious whole. I am of the opinion, therefore, that the decision of the special term was right, and should be affirmed, with costs to the respondent.

TALCOTT, J., having been elected at the general election in 1869, expressed no opinion.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, May 1, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

59b 226
68 AD*462

POPE vs. THE BANK OF ALBION.

Any language, whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, *estops* the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same. This doctrine should be most rigidly applied, as against the banks.

Experience has shown the necessity of relying upon the representations of the proper officers of the banks as to the existence of funds to the credit of those drawing checks upon them, and when these representations are made, sound policy requires that the banks shall be held responsible for their truth, and not be at liberty to show their falsity, as against *bona fide* holders of the checks who have purchased the same upon the strength of such representations. *Per* GEO. G. BARNARD, J.

Early in February, 1866, B. drew his check on the defendant's bank, for \$3000, payable to himself or order, post dated March 1, and procured C., the assistant cashier of the bank to write "accepted, A. J. C., A. Cash." on its face. The drawer had no funds in the bank, at the time, and C. had no authority to certify or accept the check. The check was subsequently indorsed by B. to G. and by G. to the plaintiff. In an action against the bank, upon the check, the referee found as facts that the plaintiff paid full value for the check, without actual notice of anything tending to impair its validity. *Held* that the plaintiff was entitled to recover.

Held also, that section 4 of chapter 383 of the act of 1840, as amended by chapter 251 of the laws of 1850, prohibiting a bank from issuing a note or bill not payable on demand and without interest, had no application to this case. The present case held to be clearly distinguishable from *The Clarke National Bank v. The Bank of Albion*, (52 Barb. 592.)

A PPEAL from a judgment entered upon the report of a referee.

The action was brought to recover the amount of a certified check.

The referee found the following facts: That on the 2d day of March, 1866, P. W. Gallaudet presented to the plaintiff, at the city of New York, a check drawn by one O. F. Burns, of which the following is a copy:

"\$3,000.

Albion, N. Y., March 1, 1866.

Cashier of the Bank of Albion, pay to self or order, three thousand dollars, and charge to the account of

O. F. BURNS."

Which check was indorsed by said O. F. Burns and by said P. W. Gallaudet, and had written on the face thereof the following words:

That said Gallaudet requested the plaintiff to cash said check, and the plaintiff thereupon, without actual notice of anything tending to impair the validity of said check, beyond what appeared upon the face of the check and the circumstances attending the transfer thereof to the plaintiff, purchased the same from said Gallaudet, and paid him therefor the full sum of three thousand dollars. That the plaintiff thereupon caused said check to be forwarded to said Bank of Albion for collection, and it was presented to the defendant's bank for payment on the 3d day of March, 1866, when payment was demanded from the defendant and refused. That said check when so presented to the plaintiff by said Gallaudet, was stamped with a United States two cent revenue stamp. That the acceptance written upon the face of said check was signed by A. J. Chester in the early part of February, 1866, in violation of his duty as assistant cashier of the defendant's bank, which appointment he then held, the said O. F. Burns, the drawer of said check, not having then, or at any time afterwards, any funds in said bank to pay the same, and his said acceptance thereof was made without the knowledge or consent of the defendant, and without any authority from it to accept or certify the same. That said A. J. Chester had been previously appointed by the defendant, assistant cashier, specially for the purpose of signing circulating notes of said bank, and continued to occupy the same position and under the same appointment until after the 3d day of March, 1866. That during all the time aforesaid, Lorenzo Burrows was cashier of said bank, and a Mr. Brooks, teller. That the defendant had never authorized any of its officers to certify to

Pope v. Bank of Albion.

checks, but had prohibited them from so doing. That it was not shown that said A. J. Chester had ever been vested with any of the general powers of cashier or teller of the defendant's bank, or with any other power than the special authority above mentioned. That said check, accepted or certified as aforesaid, by said Chester, had, during the month of February, 1866, been put into circulation by said O. F. Burns, and had been purchased by said Gallaudet prior to March, 1866.

And the referee found, as matters of law, that such acceptance being of a post dated check, when made in February, 1866, was void, because it was in violation of the provisions of the laws of 1840, chapter 363, 364, as amended by chapter 251 of the laws of 1850; also for want of authority in said Chester to so accept the same. That even if said Chester had subsequently and on the 1st and 2d days of March, 1866, authority, as "assistant cashier," to certify checks upon the defendant's bank, the plaintiff is chargeable with notice of the extent of this agency, and of his authority in the early part of February, 1866, to do the act which he then performed, and for which the defendant is sought to be charged. That the defendant was not chargeable for this act of assumed agency, which was unauthorized and illegal when performed, even if said Chester subsequently and on the 1st and 2d days of March, 1866, had full authority to accept or certify said check. That neither the aforesaid appointment of the said Chester as "assistant cashier," nor his assumption of such employment in said bank, vested him with any general power to perform the duties of cashier or teller, or to accept or certify any checks upon said bank. That his acceptance or certification of said check was without authority from, or ratification by, the defendant, and it was never bound thereby, nor did it ever accept or certify said draft or check.

Pope v. Bank of Albion.

And the referee decided that the defendant was entitled to judgment, with costs, and ordered accordingly.

The plaintiff appealed from the judgment, to the general term.

Brown & Estes, for the appellant.

I. The plaintiff, it will be seen from the evidence, was clearly a *bona fide* holder of the acceptance for full value, (and the referee does not find otherwise.) There certainly was no evidence of *mala fides* on his part, which must be shown, to defeat a recovery. (*Hall v. Wilson*, 16 Barb. 548. *Goodman v. Harvey*, 4 Adol. & Ell. 870. *Solomons v. The Bank of England*, 13 East, 135. *Steinhart v. Boker*, 34 Barb. 436. *Goodman v. Simmons*, 20 How. U. S. 363.)

II. One of the grounds upon which the referee dismissed the complaint, as stated in his report, was that it was not shown that Chester had ever been vested with any of the general powers of cashier or teller of the defendant's bank, or with any power except to sign circulating notes of the bank, and therefore held the plaintiff chargeable with constructive notice of the extent of his agency, regardless of his position of *bona fide* holder for value. The evidence of the defendant is, that Chester was appointed by a resolution of the board to sign circulating notes, but the same witness, the president of the bank, as well as the president of the Atlantic Bank, the defendant's correspondent in New York, testified that Chester, for many years previous to and subsequent to the date of the acceptance, did the defendant's correspondence, indorsed and collected its paper, and performed other acts within the duties of a bank cashier. These acts having been done at the request of and for the bank, were as binding as though included in the resolution. (*Story on Agency*, § 54.) The referee clearly erred in this conclusion, and in admitting evidence. Chester was an officer of the bank; he was more than a special agent, and the plaintiff is not chargeable with

Pope v. Bank of Albion.

notice of any limit or restriction of his duties by the bank. The rule that a party dealing with a special agent must inform himself as to the extent of his power, does not apply in this case, and especially as against a bank certifying in various forms the checks of depositors. The bank selects its officer and places him in a position of responsibility; the trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. The appointment of a cashier of a bank is a representation to strangers that he is clothed with all the duties of such an officer. The decision is in conflict with the law as laid down in the case of the *Farmers' &c. Bank v. The Butchers and Drovers' Bank*, (16 N. Y. 130.) In that case the paying teller certified checks to be good where the drawer had no funds to pay them, contrary to authority and the banking law, but as the plaintiff was a *bona fide* holder, it was held he was entitled to recover, even though the certification was otherwise void for want of authority by the banking law to make the same. In the case of *Stoney v. The Am. Life Ins. Co.*, (11 Paige, 635,) it was held that a negotiable security of a corporation which, upon its face, appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose, and at a place not authorized by its charter, and in violation of the laws of the State where it was actually issued. It was within the scope of the apparent authority of the cashier to accept or certify the check in question, as it appeared upon its face to the plaintiff, when he purchased it; and while he is bound to know the law, to wit, that a cashier cannot certify that a customer's account is good when he has no funds, yet he is not responsible for ignorance of the extrinsic fact that there were no funds, which fact the officers of the bank know,

Pope v. Bank of Albion.

but which they have the right to conceal from all persons occupying the relation of the plaintiff in this case. Since the case before the court was decided, the case of the *Clarke Bank v. Bank of Albion*, (52 Barb. 597,) has been reported, and holds that "Chester, as cashier, was one of the financial officers of the bank in its daily and ordinary business transactions; and had ample and unquestioned authority to certify checks drawn on the bank by its customers, in all cases where any officer could do the same, and bind the bank." This authority is regarded as general, growing out of the officer's position in the bank, and persons dealing with the bank are not in any way affected or bound by the special restrictions and limitations imposed upon him by the corporation."

The word *accepted* across a check upon a bank, as has been seen, is the same as the word *good*. Judge Selden says, in the case of the *Butchers' and Drovers' Bank*, certifying a check as good is equivalent to accepting by the bank, and the general term arrive at the same conclusion, in the case of *Story v. Bank of Albion*, *Rochester general term*, *op. by Judge Davis*. To hold that a person taking such paper must ascertain such a fact as the limit of authority, would, in the language of Judge Selden, in the case of the *Butchers and Drovers' Bank*, be obviously in conflict with the whole policy of the law in regard to negotiable paper. In the case of a *bona fide* holder, the apparent authority is the real authority. (See p. 139.) The only difference between the case last cited and that before the court, is, that in one case the restriction was against certifying when there was no funds, and in the other against certifying at all. The extent of the limit does not affect the principle involved. If Chester was empowered to or did act with the consent of the bank in any particular as cashier, the bank is responsible to a *bona fide* holder for any act of his apparently within the scope of his authority, or the authority of a cashier. Suppose the cashier of a bank was re-

Pope v. Bank of Albion.

stricted from doing one of a cashier's duties, and that one of the most usual ones, can it be said that if he, in violation of that restriction, performs the act restricted, creating an obligation in the form of negotiable paper, which passes into the hands of a *bona fide* holder, the bank will not be liable. Being assistant cashier made him no more a special agent of the bank, than though he were cashier, if he could perform all the cashier's duties, and the simple use of the words "assistant cashier" would indicate such authority. But treated in the light of a special agent, the bank is responsible to pay the acceptance, independent of the rule applying to negotiable paper, notwithstanding the drawer had not sufficient funds to pay the check. In the case last cited, Judge Selden says, at page 132, "I shall treat the case as one of agency specially restricted, and shall simply inquire whether a *bona fide* holder for value of a negotiable check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds;" and in this relation the Court of Appeals held the bank liable for his acts. The court further held that if the paper is, upon its face, such as the corporation may issue, and the only defect consists of extrinsic facts, to hold that an innocent purchaser must inquire as to these facts, would be in conflict with the policy of the law relating to negotiable paper. In the case of *The Bank of Genesee v. The Patchin Bank*, (3 Kern. 309, 312,) the defendant was sued upon paper it indorsed for the accommodation of a railroad company. Judge Denio says, at page 315, "the officers of a bank have no right to indorse in its behalf the paper of persons in which it has no interest, or to make the bank a party to paper for the accommodation of any one. These contracts are void upon the same principle that an indorsement by a partner, of the firm name, without the consent of his co-partners, for the benefit of a third party, would be inoper-

Pope v. Bank of Albion.

ative against the firm; but if the partner affixes the partnership name to paper, in which the firm has no interest, and such paper is negotiated to an innocent holder for a valuable consideration, the firm is bound." (*Catskill Bank v. Stall*, 15 *Wend.* 364.) "The giving of a note in the partnership name by a partner, is a virtual representation that it is given in the partnership business, and if negotiable, this representation is deemed in law to have been made to every subsequent *bona fide* holder of the note." (*State of Illinois v. Delafield*, 8 *Paige*, 527. 2 *Hill*, 159.) It is claimed that Chester was a special agent; but whether general or special, he was the cashier of the bank for the performance of certain cashier's duties, and the word assistant implied nothing more than that he acted generally as assistant, and therefore his acts would receive the same verity as those of the cashier.

III. It matters not in this case whether Chester was a general or special agent; or whether he was prohibited or restricted from certifying or accepting checks; unless the plaintiff knew of the restrictions; because the act of accepting being within the apparent scope of his authority, he was enabled by the defendant to, and he did certify falsely, and thus defrauded the plaintiff. The defendant is therefore liable within the familiar rule that as between two innocent persons that one must lose who puts it in the power of a third person to defraud. This doctrine is recognized in the case of the *Butchers and Drovers' Bank*. (See also *Hern v. Nichols*, 1 *Salk.* 289.) The rule in regard to special agency does not, therefore, apply to this case.

IV. The defendant is also estopped from proving that the drawer had no funds, or not sufficient funds, with which to pay the check, if the act of acceptance "clearly inferred" to a *bona fide* holder for value that the drawer had funds in the bank with which to pay the check. (See *Bank of Genesee v. The Patchin Bank*, 19 *N. Y.* 312; *Irrving Bank v. Wetherald*, 36 *id.* 335; *N. Y. and N. H. R. R.*

Pope v. Bank of Albion.

Co. v. Schuyler, 34 *id.* 73.) The doctrine of estoppel has been extended so far as to apply to the indorser of a note void for usury, and a recovery was had against him when he falsely alleged it was business paper. (*Holmes v. Williams*, 10 *Paige*, 326. *Dowe v. Schutt*, 2 *Denio*, 621. *Truscott v. Davis*, 4 *Barb.* 495. *Dezell v. Odell*, 3 *Hill*, 215.) The certificate or acceptance of a check by a bank clearly amounts to a declaration that it is in funds to pay it. Such would be the presumption as against an individual. (See *Thurman v. Van Brunt*, 19 *Barb.* 409; *Kingman v. Hoteling*, 25 *Wend.* 423.) And as a bank cannot legally become surety for another upon paper in which it has no interest, it is clearly inferable, and is a declaration to that effect.

V. The referee further held that the check being post dated, as well as the acceptance thereof by the defendant's cashier, was void, and in violation of the laws of 1840. (*Laws of 1850, ch. 363, § 4, as amended by ch. 251.*) This section prohibits a bank from issuing a note or bill not payable on demand, and without interest. The acceptance in question was payable on demand, on the day of its date and without interest. And although it was post dated, yet it did not so appear to the plaintiff, who first saw and purchased it the next day after its date. And whether the acceptance was void or not in the hands of a holder with knowledge of the fact that it was post dated, yet the defendant is clearly estopped from setting up the defense against a *bona fide* holder for value, upon the ground that the acceptance was upon its face, on and after its date, a declaration made to him on the day of its date, that the drawer's account was good. The doctrine of estoppel applies to paper expressly made void by statute, as has been seen. The bank is therefore liable for the acts of Chester, and it must sustain the loss rather than the plaintiff, within the rule that, as between two innocent persons, that one must lose who puts it in the

Pope v. Bank of Albion.

power of a third person to defraud. (*Hern v. Nichols*, 1 Salk. 289. *Farmers' &c. Bank v. Butchers and Drovers' Bank*, 16 N. Y. 133.) The doctrine of estoppel as applied in this case, is recognized in the case of *Story v. The Bank of Albion*, opinion by Judge Davis, (general term opinion,) which case was like this, except, that the plaintiff purchased the acceptance *before its date*, and he was not allowed to recover, for the reason that he was not a *bona fide* holder, he having knowledge that it was post dated, and it did not therefore appear to him that the acceptance was a declaration of an existing fact, but that the fact certified will be true on a future day. The court, however, concede that a *bona fide* holder might recover in this case.

J. M. Van Cott and *E. A. Doolittle*, for the respondent.

I. As between the bank and Burns, the drawer, and Gallaudet, the indorsee, the acceptance was manifestly void.

II. And the plaintiff cannot recover upon an acceptance void in its inception, unless he can prove himself a *bona fide* holder, without any notice to put him on inquiry. He is not such a *bona fide* holder. 1. He had notice of the physical fact, that a draft offered for sale "about eleven o'clock" in the morning of March 2, could not have been presented at the Bank of Albion during bank hours on March 1. 2. He saw on the face of the draft, in the word "accepted," an explanation of the presence of the draft in this city on the 2d, viz, that it had been drawn upon time, post dated, and accepted before the 1st of March. 3. The attempted explanation of the transfer by Gallaudet to the plaintiff, throws a cloud of suspicion over the whole case. (a.) It was not possible for the plaintiff to make anything on the transaction, he paying the "full" \$3000. (b.) It was certain, on the other hand, that he must lose the whole cost of collection; and must take all risks besides. (c.) It does not appear that he had ever

Pope v. Bank of Albion.

made a similar transaction either before or since. (d.) And he did it all, that Gallaudet might possibly save \$7.50, and that he should certainly lose \$1500. Such miracles of friendship are possible, but commercial transactions proceed on a different footing. 4. Upon the state of facts proved the referee had a right to find, and it was his duty to find, that the cashier had accepted the draft without authority; that the defendants had never ratified his unauthorized act, and that the plaintiff had not the rights of a *bona fide* holder. (See *Laws of 1838, ch. 380, §§ 18, 21*; *Laws of 1841, ch. 319, § 1*; *Laws of 1840, ch. 363*; *Laws of 1850, ch. 251*; *F. and M. Bank v. Butchers and Drovers' Bank*, 16 *N. Y.* 130; 14 *id.* 627; *Potter v. Merchants' Bank*; 28 *id.* 649; *Leavitt v. Blatchford*, 5 *Barb.* 25; *Beach v. Vandewater*, 1 *Sandf.* 265.)

By the Court, GEO. G. BARNARD, J. I think the judgment should be reversed. This case is clearly distinguishable from *The Clarke National Bank v. Bank of Albion*, (52 *Barb.* 592.) In that case the plaintiff was not a *bona fide* holder for full value of the check, as is the plaintiff in this case. The learned referee finds that the plaintiff paid full value for the check, and had no actual notice of any fact impeaching its validity. I think, within the principles established by the case cited, that the plaintiff is entitled to recover. In that case the court say: "Chester, as cashier, was one of the the financial officers of the bank, in its daily and ordinary business transactions; and had ample and unquestioned authority to certify checks drawn on the bank, by its customers, in all cases where any officer could do the same and bind the bank. This authority is regarded as general, growing out of the officer's position in the bank, and persons dealing with the bank are not in any way affected or bound by the special restrictions and limitations imposed upon him by the corporation, whose agent he is. In this case the defendant's

Pope v. Bank of Albion.

liability is sought to be established upon this general and conceded power. There is no claim made by the defendant, or if there is, it is wholly unsupported by the evidence, that Ward & Bro. had any notice of the special restrictions given to the cashier by the chief stockholder and president of the bank. * * * To enable the plaintiff to recover upon this paper, it must appear that he became the owner and holder in good faith, for a full and fair consideration, in the usual course of business, and without notice of the cashier's want of power to make the certification. (*Hall v. Wilson*, 16 Barb. 550.) This rule is elementary; and does not need to be supported by the citation of authorities which are so full and abundant.

Applying this test, it is at once apparent that the plaintiff cannot recover; for he did not pay anything for this paper until after the check was returned to him by the defendant, dishonored. That the holder must have parted with something of value upon the strength and in consideration of the transfer of the paper, is well settled. A party taking negotiable securities upon a precedent debt, relinquishing nothing of value at the time, or without any consideration, is not a purchaser for a valuable consideration.

I regard this doctrine as demonstrating the plaintiff's right to recover, upon the facts found by the referee and indisputably proven. Suppose that the plaintiff had, in company with Burns, the drawer of the check, gone to the bank, and producing the check, inquired whether it would be paid, and had been answered by Chester in the affirmative, and had thereupon cashed the check, as he did in New York, would anybody doubt the plaintiff's right to recover? I think not. In principle, Chester, made the same representations when he wrote the word "accepted." This expression is equivalent to saying "that check is good;" that the drawer had funds in the bank which would be applied in payment of the check

Pope v. Bank of Albion.

when presented for that purpose. We must regard the substance of things, and not mere form. Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, *estops* the bank from thereafter denying, as against a bona fide holder of the check, the want of funds to pay the same. This doctrine should be most rigidly applied as against the banks. They clothe their officers with powers necessary to operate them successfully, and experience has shown the necessity of relying upon the representations of the proper officers of the banks as to the existence of funds to the credit of those drawing checks upon them. When these representations are made, sound policy requires that the banks shall be held responsible for their truth, and not be at liberty to show their falsity, as against bona fide holders of the checks, who have purchased the same upon the strength of such representations.

These great moneyed corporations carry on their business operations only through their officers. If they violate their duties by representing that the drawer of a check has funds, when the contrary is the fact, it is the misfortune of the bank, as it is the misfortune of every principal employing agents who exceed their authority. In such a case, I am of the opinion that when a loss must be sustained, by either the bank or the person relying on such representations, it must fall upon the former. The law of 1840, as amended in 1850, has no application to this case, that I can discover.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

CAROW vs. KELLY, Sheriff, &c.

A chattel mortgage can be avoided for usury, by a judgment and execution creditor of the mortgagor.

A person who, like an execution creditor, asserts a lien upon mortgaged property, is not a stranger, within the meaning of the rule that the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower—that is to say, by a mere stranger.

THIS action was brought by the plaintiff as mortgagee of a lathe and other chattels, against the defendant as sheriff, for unlawfully taking and detaining the same. The articles in question were in the possession of the plaintiff as mortgagee, and were taken and sold by the defendant under executions on judgments against the mortgagors. For this taking the action was brought. The defendant justified his taking under the executions and judgment. The issues were tried before Mullin, J., and a jury. The question on the trial was as to the validity of the plaintiff's chattel mortgage. The defendant claimed that it was usurious, and made and delivered in fraud of the creditors of the mortgagors.

The facts, as shown by the evidence, are as follows: The firm of Sutherland, Tyler & Stoddard was organized in July, 1864, and was composed of James Sutherland, Edmund L. Tyler and Thomas Stoddard. Their business was iron forging, and was carried on at the corner of avenue C and 17th street, in the city of New York. This business had been carried on previous to that date by a firm composed of said Sutherland and Stoddard, and two others; but not having means enough to carry on the business, they applied to the plaintiff for a loan of money, and he proposed to lend the concern \$50,000, provided his brother-in-law, Daniel L. Tyler, was taken into the concern, and it bought the lots on which the forge stood, and the plaintiff was paid a bonus of \$4000 per year for said loan, in addition to the interest. Accordingly, the

Carow v. Kelly.

said Tyler bought out the two other partners of the old firm, and the firm of Sutherland, Tyler & Stoddard was organized. A negotiation was opened for the purchase of the property where the forge stood, but the title not being satisfactory, ten vacant lots on avenue B were purchased for \$26,000. This money was advanced by the plaintiff, and the transaction, in form, was that the deed was taken in the plaintiff's name, with the understanding that he would convey the same to Sutherland, Tyler & Stoddard, upon being paid the said \$26,000; and a lease was entered into, whereby the said firm agreed to pay the plaintiff an annual rent of \$7500 for the lots. They were vacant lots, and of no use to any one, in their condition at that time. A written agreement was entered into, dated July 1, 1864, between the plaintiff, of the first part, and Sutherland, Tyler & Stoddard, of the second part, reciting that whereas the plaintiff had leased said ten lots to Sutherland, Tyler & Stoddard, for the annual rent of \$7500, the plaintiff agreed, in consideration thereof, (so long as said rent should be punctually paid, not extending beyond May 1, 1864,) to advance for the purpose of said business the sum of \$23,000, or such portion thereof as might be needed, and provide sufficient down town office accommodation for the purposes of said business; and that the said plaintiff should manage and superintend the monetary and commercial part of such business; and said Sutherland, Tyler & Stoddard agreed to execute a mortgage to the plaintiff upon all their buildings, machinery and property, as collateral security for the due performance of the terms and conditions of said lease. A chattel mortgage was executed by Sutherland, Tyler & Stoddard, in pursuance of said agreement, dated July 1, 1864. This mortgage was not filed until May 31, 1865, and the lease was never recorded.

At the time the plaintiff promised to loan \$50,000 to Sutherland, Tyler & Stoddard, they agreed to pay him

Carow v. Kelly.

therefor the interest, and a bonus of \$4000 a year, and the \$7500 mentioned in the lease, as the annual rent of said ten lots was made, in pursuance of such agreement, as follows:

Interest on \$50,000, (\$27,000 for lots, and \$23,000 to be advanced,) per year, ...	\$3,500
Bonus for use of money, ...	4,000
Total, ...	<u>\$7,500</u>

This arrangement of the lease the defendant claimed, was a blind to cover up the \$4000 bonus. The plaintiff did not attend to the financial business of the firm, nor was any down town office furnished or needed. In March 1865, the said firm being in need of more money, the partners, Stoddard & Tyler, agreed to furnish \$3000 and \$4000, respectively, and Mr. Tyler did furnish \$3600 and Mr. Stoddard \$3000. In June, 1865, the firm were sued, and they discovered that they could not go on. After the trouble commenced, it was proposed to make a mortgage for all they owed the plaintiff, but Sutherland and Stoddard objected, on the ground that other creditors ought to have a chance as well as the plaintiff. Stoddard finally signed it, and told Sutherland, in the presence of the plaintiff, that unless they "signed the mortgage, Mr. Tyler could confess a judgment, and it would take the whole thing away." Sutherland refused to sign the mortgage, unless there was a general assignment for the benefit of all the creditors; and an arrangement was finally made, that a general assignment should be executed. The plaintiff was present, either in person or by his attorney, Mr. Campbell, during the several meetings and negotiations that resulted in the execution of the assignment and mortgage. The mortgage was executed June 2, 1865, late in the afternoon, and the assignment was executed the next morning. They were claimed to be one transaction. It was all arranged about the same time. Prior to and at

Carow v. Kelly.

the time the mortgage and assignment were executed, there was talk of forming a stock company, with the plaintiff for president, and the mortgage was executed by the mortgagors with the intention of putting off creditors and delaying them until the mortgagors could get this stock company up and settle with their creditors.

The charge of the court submitted to the jury the proposition, that if they were satisfied from the evidence that the object of the assignment was to enable those two persons (members of the firm) who would advance money to the firm, to secure either their friends this money or themselves, or for their benefit, which was not in truth a debt against the firm, it was evidence of a corrupt intent on the part of the assignors, which should vitiate their assignment, provided they were satisfied that was the intent of the transaction, otherwise not; that they would see it became all important to determine whether the plaintiff was in any way a party to, or cognizant of, this transaction, so that his mortgage became connected with the assignment. That the mere knowledge of the transaction by the plaintiff, that they intended to make an assignment at the same time, would not bind him; but it must be so connected as that the whole scheme would fail unless the whole scheme was carried out; that is, that the mortgage would fail unless the scheme in regard to the assignment was carried out. That if they found that the transaction of the lease &c. was a cover, and that the object of the parties was to get an usurious rate of interest, then the mortgage was void as against those creditors whose executions the sheriff held at the time the action was commenced.

To the charge as given, and to the refusal to charge, the plaintiff excepted. Some exceptions were also taken to the admission or exclusion of evidence.

The jury found a verdict for the defendant; whereupon a motion was made for new trial on the minutes, which

Carow v. Kelly.

was denied, and judgment having been perfected, the plaintiff appealed from the order denying a new trial, and from the judgment.

E. P. Wheeler, for the appellant.

I. The judge's charge on the subject of usury was erroneous. The evidence as to usury was admitted against the plaintiff's objection and exception. The mortgage was not void as against judgment creditors. After the original loan, the borrowers and lender met, and stated the account between them, and credit was given to the borrowers for certain sums paid by them on account. The borrowers gave a mortgage for the amount shown by this accounting to be due. No person claiming under them can impeach this mortgage for usury in the original loan. This was expressly decided in *Bullard v. Raynor*, (30 N. Y. 197.) And in *Murray v. Judson*, (9 N. Y. 73,) it was held that a judgment creditor could not impeach an assignment because it preferred a usurious debt.

II. The original loan was not to the mortgagors, but to Sutherland & Co., their predecessors in business. The new firm assumed all the liabilities of the original borrowers, including the debt in question. When a grant of land is made expressly subject to a usurious mortgage, the grantees cannot set up the defense of usury, as against the mortgage. (*Hartley v. Harrison*, 24 N. Y. 170. *De Wolf v. Johnson*, 10 Wheat. 367, 393.) The same principle applies where the grantees assume the debt, and give a new mortgage to secure it. This is an affirmation of the first loan; the mortgage is valid, and no person claiming under the mortgagors can set up usury in the original loan. (*Sands v. Church*, 6 N. Y. 347.)

III. The grantee of land or chattels cannot avail himself of the defense of usury in a prior mortgage. (*Ohio and Miss. R. R. v. Kasson*, 37 N. Y. 218. *Chamberlain v. Dempsey*, 36 id. 144. *Mechanics' Bank v. Edwards*, 1 Barb.

Carow v. Kelly.

271. *Affirmed G. T., 1st Dist., 2 id. 545.*) It was held otherwise in *Cole v. Savage*, (10 *Paige*, 583,) and *Dix v. Van Wyck*, (2 *Hill*, 522;) but these cases were overruled by the court of errors in *Post v. Bank of Utica*, (7 *id.* 391,) which was followed by the Court of Appeals in *Rexford v. Widger*, (2 *Comst.* 131,) and *Schermerhorn v. Talman*, (14 *N. Y.* 93.)

IV. The judgment creditor can claim no better position than a *bona fide* purchaser for value. (*Post v. Bank of Utica*, 7 *Hill*, 391.)

V. The exception to the refusal to charge, "that unless Carow participated in any fraudulent intention on the part of Sutherland, Tyler & Stoddard to hinder and delay creditors, the mortgage is not to be deemed fraudulent for that reason," is well taken. The charge, as given, was: "If this transaction (the making of the assignment) was known to the plaintiff, if he was cognizant of it or assenting to this transaction, then he is charged with the result; it does connect his mortgage with that assignment, and he must take the consequence." In other words, the judge charged that if Sutherland, Tyler & Stoddard made a fraudulent assignment, and Carow knew they were about to make an assignment, but did not know the fraud, nor participate in it, his mortgage is void. This is not the law; and the exceptions referred to are well taken; so is that to the admission of the assignment in evidence. A fraudulent intent on the part of the mortgagee is just as essential as a fraudulent intent on the part of the mortgagor, if there is a consideration for the mortgage. (*Waterbury v. Sturtevant*, 18 *Wend.* 353. *Carpenter v. Muren*, 42 *Barb.* 300.) The only fraud in the assignment that was alleged was, that it preferred as partnership creditors Weston and Gray, and Daniel Tyler, who had lent money to Captain Stoddard and E. L. Tyler. Carow was not one of these persons. The fraud alleged does not affect him or his mortgage, and his presence at the assignment, and knowledge of its

Carow v. Kelly.

terms, do not make him a party to any fraud in it. (*Putnam v. Hubbel*, 42 N. Y. 106.) There cannot be any pretense of any actual fraud in the mortgage. No one had a better right to be preferred by the firm than Carow, for he had lent them money to a large amount, and he had a mortgage for it, which was valid as to the firm, but which, through mistake, had not been filed. They were bound to give him a new one, on every principle. It cannot justly be said that the creditors were prejudiced by the not filing. At that time preferential assignments were lawful and common, and it was equally common, and considered almost a duty, to prefer those who had lent money to the person making the assignment. The mortgagors practically turned over the property covered by the mortgage in payment of their debt. Carow took possession under it immediately. A preëxisting debt is a sufficient consideration for a mortgage, as against other creditors. (*Stover v. Eyclesheimer*, 3 Keyes, 620. *Seymour v. Wilson*, 19 N. Y. 417.)

VI. The plaintiff, being examined as a witness, was asked: "Had you any other intention or object in taking this mortgage, except to secure your debt?" The question was excluded, and the plaintiff excepted. The exception was well taken. The question was not objected to as leading. Had it been, the form could easily have been modified. The intention of the plaintiff certainly was material on the question of fraud. (*See cases cited under 5th point.*)

A similar question was held proper in *Seymour v. Wilson*, 14 N. Y. 567,) and was allowed by the judge on this trial. So also, *Forbes v. Waller*, (25 N. Y. 430;) *Thurston v. Cornell*, (38 N. Y. 281.)

A. J. Vanderpoel, for the respondent.

I. The plaintiff's mortgage was void for usury. In it was included and sought to be secured the \$4000 bonus per annum, which the plaintiff exacted for the use of

Carow v. Kelly.

moneys loaned to the mortgagors, over and above the legal interest on said moneys. This was done under cover of paying rent for the vacant lots and for the plaintiff's services, &c., and \$625 monthly (\$7500 per annum,) was regularly credited to the plaintiff therefor, which went into the consideration of the mortgage. The court charged the jury that if they should find that this agreement "was a cover, and that the object of the parties was to get a usurious rate of interest, then the mortgage is void as against these creditors whose executions the sheriff held at the time this action was commenced." No exception was taken to this charge, and the court, at the request of the plaintiff, further charged, "that there was nothing which makes it a usurious agreement *per se*; that it was perfectly competent for the parties to make an agreement with the plaintiff for compensation for his services, *if made in good faith*." The question of usury was thus fairly submitted to the jury; they, by their verdict, pronounced the mortgage usurious and void, and the evidence abundantly sustains the verdict. (*Dix v. Van Wyck*, 2 Hill, 522. *Thompson v. Van Vechten*, 27 N. Y. 568. *Schroepfel v. Corning*, 5 Denio, 236. *Mason v. Lord*, 40 N. Y. 476. *Post v. Dart*, 8 Paige, 639. *Shufelt v. Shufelt*, 9 id. 137. *Brooks v. Avery*, 4 N. Y. 225. *Bullard v. Raynor*, 30 id. 197, 203.)

II. The facts fully justified the conclusion of the jury that the plaintiff's mortgage and the general assignment were parts of a single transaction, and so connected that fraud in the assignment tainted the mortgage. 1. Sutherland testified, "the assignment was drawn several days before the chattel mortgage was executed; both were one transaction; it was all arranged about the same time." Sutherland and Stoddard refused to sign a mortgage unless the assignment was made. The learned judge instructed the jury that if the plaintiff was cognizant of or assented to this he is charged with the result; that it connects the mortgage with the assignment; but if he was

Carow v. Kelly.

neither knowing or assenting to it, then he is not chargeable with it. "His mere knowledge of the transaction, that they intended to make an assignment at the same time would not bind the plaintiff; but it must be so connected that the whole scheme would fail unless the scheme in regard to the assignment was carried out. You will determine this question, and you will require, before you find these results, evidence which satisfies your own minds, as sensible men, that that is the fair and reasonable inference from the evidence in this case." The jury by their verdict found that the two instruments were thus connected, and the evidence abundantly justifies such finding.

III. The mortgage was fraudulent and void as against the executions, because made with intent to hinder, delay and defraud creditors. 1. The intention of the mortgagors, in making the mortgage and assignment, was to put off and delay their creditors until they could get up a stock company. (*Work v. Ellis*, 50 Barb. 512.)

IV. The mortgage and assignment were fraudulent and void, because the assignment preferred as a firm debt the \$3600 which the partner Tyler had contributed to the co-partnership capital in March, 1865, and also the \$2000 which the partner Stoddard had contributed at the same time. The books were fraudulently changed to make these sums appear as debts due to Daniel Tyler and Weston & Gray, and the amounts were preferred as indebtedness to them. These debts were false, and the preference was in fact for the benefit of the assignors Tyler & Stoddard themselves. This avoided the assignment. (*Elias v. Farly*, 5 Abb. N. S. 39.) Even if the partners had individually borrowed said sums respectively from the parties named, the assignment was void, because it thus appropriated partnership property to pay individual debts. (*Wilson v. Robertson*, 21 N. Y. 587.)

V. The judge very properly declined to charge "that unless Carow participated in any fraudulent intention on

Carow v. Kelly.

the part of Sutherland, Tyler & Stoddard, to hinder and delay creditors, the mortgage was not to be deemed fraudulent for that reason." 1. The mortgage and assignment were portions of the same transaction, so that if the assignment was fraudulent and void the mortgage was void also. It has never been held necessary to show fraud on the part of any but the assignors, in order to avoid a general assignment. (*Griffin v. Marquardt*, 17 N. Y. 28.) 2. There being no present consideration for the mortgage, it was not necessary to show a fraudulent intent on the part of the mortgagee. (*Wood v. Hunt*, 38 Barb. 302. *Newman v. Cordell*, 43 id. 448.) 3. The judge had previously charged "that if the plaintiff had advanced money at the time and took the mortgage as security, then, although the firm may have been fraudulent, if he (Carow) was not a party or cognizant of it, or assenting to it, it would not affect his mortgage. But if it was given for an old debt, if you are satisfied that it was, in truth, fraudulent on their part, and that he was cognizant of this assignment, connected with it, he is charged with that, because he had not a *bona fide* mortgage for value, paid at the time the mortgage was given, and he took it subject to all the infirmities which exist in the mortgage."

To this charge no exception was taken by the plaintiff, and it was a clear and proper statement of the law, as applicable to the facts.

VI. The question put by the defendant's counsel to the witness, Stoddard, as to the intention of the mortgagors in executing the mortgage and assignment, was proper. (*McKown v. Hunter*, 30 N. Y. 625. *Griffin v. Marquardt*, 21 id. 121.)

VII. The leading question put to the defendant by his own counsel, on direct examination, as to whether he had any other intention in taking the mortgage except to secure his debt, was properly excluded. The statute says nothing about the intent of the vendee or mortgagee.

Carow v. Kelly.

The intent of the vendor or mortgagor is only to be looked at; and then the second question arises, under some circumstances, whether the vendee or mortgagee had notice of that intent. In this case the plaintiff only took his mortgage to secure an alleged old debt again. The jury having found that the mortgage and assignment were parts of the same transaction, the plaintiff's intention became immaterial.

By the Court, CARDOZO, J. This case was reserved, on the argument, merely upon the point whether the judge erred in holding that the mortgage, under which the plaintiff claimed, could be avoided for usury, by a judgment and execution creditor. The precise point was held in conformity with the ruling below, in *Dix v. Van Wyck*, (2 *Hill*, 522,) and that case was recognized and cited as law by the Court of Appeals in the recent case of *Mason v. Lord*, (40 *N. Y.* 488.) I think it unnecessary, therefore, to review the authorities relied upon by the appellant's counsel. They do not conflict with the decision in *Dix v. Van Wyck*, but are simply applications of the well recognized rule that the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower—that is to say, by a mere stranger. But a person who, like an execution creditor, asserts a lien upon the property, is not a stranger, within the meaning of the rule. (*Thompson v. Van Vechten*, 27 *N. Y.* 568. *Dix v. Van Wyck*, *supra*.)

The judgment should be affirmed.

FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham, P. J., Cardozo and Geo. G. Barnard, Justice.*]

GELPCKE and others vs. QUENTELL.

The defendant, by a letter of credit dated at Bremen, addressed to the plaintiffs at New York, opened an account with the latter in favor of R. & Co., of New Orleans, for \$50,000, to be used by sixty days' sight drafts; adding: "This credit is intended for advances to be made on consignments of merchandise to my address, and you will please to keep the same in force for the coming year, 1860. It is, however, not required that bills of lading accompany the advice of the drafts." *Held* that the general authority first conferred by this letter was not restricted by the subsequent clause. That the latter clause did not make it the duty of the plaintiffs to see, before they accepted drafts drawn by R. & Co. which were apparently within the terms of the authority, that they were drawn against consignments made to the defendant's address.

Held, also, that the clause, "it is, however, not required that bills of lading should accompany the advice of the drafts," should be construed as dispensing with the necessity of the bills of lading accompanying the drafts themselves.

Instruments of that character should be construed as the parties to whom they are addressed may fairly and reasonably be expected to understand them.

THIS is an appeal by the plaintiffs from a judgment entered at the circuit, dismissing the complaint, with costs.

This action was brought by the plaintiffs to recover from the defendant the sum of \$33,419.45, with interest from April 16, 1860, being money paid and laid out by the plaintiffs for the defendant, at his request and for his account, by accepting and paying eight bills of exchange drawn by the firm of H. Rodewald & Co., at New Orleans, the agents and correspondents of the defendant, under and in conformity with a letter of credit, addressed by the defendant to the plaintiffs. By this letter, dated Bremen, December 24, 1859, the defendant writes to the plaintiffs:

"I take the liberty to open a credit with your house for my account in favor of Messrs. Henry Rodewald & Co. in New Orleans, for the amount of \$50,000 to be used by sixty days' sight drafts.

This credit is intended for advances on consignments of merchandise to my address, and you will please to keep

Gelpcke v. Quentell.

the same in force for the coming year, 1860. It is, however, not required that bills of lading accompany the advice of the drafts.

Requesting you by a few lines to apprise [advise] Messrs. Henry Rodewald & Co. of the opening of the credit, and assuring you that your drafts for reimbursement *to a point* to be drawn on me at the maturity of your acceptances will be promptly honored. I remain," &c.

This letter was received 17th of January, 1860. The plaintiffs consented to open this credit, and on the same day, in conformity with the request of the defendant, apprised, by letter, the firm of H. Rodewald & Co., in New Orleans, of this credit being opened by the defendant with the plaintiffs, and accepted by them, and also on the same day apprised the defendant by letter that they, the plaintiffs, had granted the credit. On the 1st of February, 1860, Messrs. H. Rodewald & Co., at New Orleans, who were to use this credit, sent a letter of advice to the plaintiffs that they had drawn on them under the letter of credit, which letter reads:

"New Orleans, Feb. 1, 1860.

Gentlemen: We are in receipt of your favor of 17th inst. confirming a credit opened with you by Mr. Wm. Ed. Quentell, Bremen, in our favor for \$50,000.

We took the liberty to-day to value on acct. of this credit in our dft. No. 3255, 60 dys. o. order, \$3000, which you will please protect and reimburse yourself on Mr. Quentell at maturity.

Yours respectfully, HENRY RODEWALD & Co."

On the same day, 1st February, 1860, this firm drew their bill of exchange for \$3000, at sixty days' sight on the plaintiffs, which was accepted by the plaintiffs on 8th February, 1860, and paid at maturity. On the 4th February, 1860, Rodewald & Co. addressed a second letter to the plaintiffs, advising them of the two other drafts for \$2500

Gelpcke v. Quentell.

each, drawn by them on account of said credit opened by the defendant.

This firm drew these two drafts, as advised, at sixty days' sight for \$2500 each, and negotiated them. The plaintiffs accepted these drafts 10th of February, 1860, and paid them at maturity. On the 7th of February, 1860, H. Rodewald & Co. addressed another letter to the plaintiffs, advising them that they had drawn five other bills of exchange for \$5000 each, at sixty days' sight, under the credit opened by Quentell.

The plaintiffs accepted these five bills, and paid the same at maturity. The plaintiffs, by their letter of 10th of February, 1860, advised the defendant that H. Rodewald & Co. had drawn on them the three drafts first mentioned; and on the 10th April, 1860, by letter, advised the defendant that they had drawn on him for reimbursement of the payment of the three drafts, together with the expenses and commissions; and on the 18th of April, 1860, by letter, they advised him that they had drawn on him for reimbursement for the payment of the five drafts last mentioned for \$25,000, together with expenses and commissions; but the defendant refused to pay the plaintiffs any reimbursements for their having paid the drafts of H. Rodewald & Co. mentioned.

The plaintiffs brought this suit to recover for their outlay and payment of the several eight drafts. On the trial, they proved the letter of credit and the letter of advice of H. Rodewald & Co., and desired to put in evidence the bills of exchange drawn in accordance with the letter of credit and letter of advice, but the court ruled the several bills of exchange out, as not being within the letter of instructions; to which ruling the plaintiffs' counsel excepted. The court required that the plaintiffs should first prove that the several bills were actually drawn against shipments consigned to the defendant; the plaintiffs did

Gelpcke v. Quentell.

not furnish such proof; the bills of exchange offered were excluded, and the complaint was dismissed.

B. Roelker, for the appellant.

I. The contract of the defendant, contained in his first letter, was an original, and not a collateral undertaking, or guaranty. The main purpose and object of the promisor, the defendant, was not to answer for the debt of another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself, namely, a loan or advance of money by the plaintiffs to the defendant himself, through his agents in New Orleans, who were to procure or make consignments to him, on which advances were to be made; and this loan to him by the plaintiffs, the defendant promised to pay back himself to the plaintiffs. The defendant, and not his agents, Rodewald & Co., became the debtor to the plaintiffs. (*Emerson v. Slater*, 22 How. U. S. 28, 43. *Lawrason v. Mason*, 3 Oranch, 492. *Nelson v. Boynton*, 3 Metc. 400. *Alger v. Scoville*, 1 Gray, 391.) In this respect the case at bar is essentially different from the case of *Birckhead v. Brown*, (5 Hill, 634, 644; *S. C.*, 2 Denio, 375,)

II. The words in the defendant's letter, "this credit is intended for advances on consignments of merchandise to my address," are words of information, and not of instruction, or part of a mandate; they do not form a condition precedent, and only *motive* the following words, "and you will please to keep the same in force for the coming year 1860," by which words he intends to show that it is to be a continuous credit for one year, and shall not be considered exhausted by advancing only once the sum of \$50,000. This meaning becomes evident from the words added, "it is, however, not required that bills of lading accompany the advice of the drafts," and the further request made to advise Rodewald & Co. that this credit of \$50,000 is opened by the plaintiffs, and that Rodewald & Co. are authorized

Gelpcke v. Quentell.

to draw to this amount. This is the natural interpretation of the letter of instructions of the defendant. If there be any doubt, the general rule in the interpretation of contracts applies, that the words of the instrument shall be taken most strongly against the party employing them. This rule has especially been applied to letters of credit and of guaranty. In *Douglas v. Reynolds*, (7 *Peters*, 113, 122; 10 *Cond. R.* 420,) the court says: "As these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement, and for this purpose it was recognized by this court in *Drummond v. Prestman*, (12 *Wheat.* 515,) as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit; and the same rule was laid down in the King's Bench, in *Mason v. Pritchard*, (12 *East*, 227.) (See also *Bell v. Matthias*, 1 *How.* 160; *S. C.*, *Cond. R.* 552, 559; *Dick v. Lee*, 10 *Peters*, 493.) And in *Lawrence v. McCalmont*, (2 *How.* 445,) Judge Story, speaking of the interpretation of letters of credit and guaranty, says: "Indeed if the language used be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury." (See also *Walrath v. Thompson*, 4 *Hill*, 200; *Ulster County Bank v. McFarlan*, 3 *Denio*, 565; *Gates v. McKee*, 13 *N. Y.* 235, *per Denio*, J.) The case of *Greele v. Parker*, 5 *Wend.* 414; *S. C.*, 2 *id.* 545,) shows what the courts will not consider as a condition precedent. This was an action by *Parker v. Greele* as the acceptor of a bill of exchange, drawn by one Stone on Greele. Greele wrote to Stone, "I have no objections to accepting for you

Gelpcke v. Quentell.

at three and four months, for \$2500, on the terms you propose." It was held that Parker could recover against Greele on the acceptance contained in the letter, without showing what were the terms proposed, adverted to in the letter, or a compliance with them. *The Bank of Michigan v. Ely*, (17 Wend. 508, 514,) holds that where a principal authorizes his agent to draw, "if he wants more funds," it is not for him to set up an abuse of this discretion, to avoid the obligation; unless it be brought home to the plaintiffs, of which there is no pretense here. To the same effect is *Burns v. Rowland*, (40 Barb. 368.) In the case at bar, the defendant does not state that the plaintiffs should accept and pay the bills drawn by Rodewald & Co., provided they were drawn against shipments, but only provided they were drawn at sixty days' sight, and did not exceed the sum of \$50,000. In the case of *Schimmelpennich v. Bayard*, (1 Pet. 264,) the sending in of bills of lading was made a condition precedent for making advances on consignments. This case shows also how far a principal is bound by the acts of his agent.

III. It is evident it was not intended by the defendant that the plaintiffs should see to it that the bills were drawn against shipments; because the defendant, in his letter of December 24th, requested the plaintiffs to advise Rodewald & Co. that the credit was opened in their favor, to be used by them, sixty days' sight drafts. The plaintiffs did so by their letter of January 17th, and therein they conformed precisely to the very letter of their instructions. The words of confirmation contained in their letter, at the end, "in confirming this credit," &c., added nothing to its import. Had these words been omitted, the idea which they express would have been a necessary implication. *Expressio eorum quae tacite insunt nihil operatur.* (*Wingate's Maxims*, No. 66. *Broom's Leg. Max.* p. 519.) If the plaintiffs had written, "Mr. Quentell has opened a credit with us in your favor, to be used by you by sixty

Gelpcke v. Quentell.

days' sight drafts on us; the credit is intended for advances on consignments of merchandise addressed to him, but that no bills of lading need accompany your letters of advice; the whole amount running and unpaid shall not exceed \$50,000, the credit to be in force for the year 1860. Mr. Quentell will reimburse us for the amounts we pay on your drafts, together with all expenses;" such a letter would have had the necessary import that Rodewald & Co. were authorized to draw on the plaintiffs, and that the plaintiffs would accept the bills. Such a letter would be of the same import as that passed upon by the court in *Ulster Bank v. McFarlan*, (5 Hill, 232.) By addressing this letter, at the request of the defendant, to Rodewald & Co., the plaintiffs became bound to the latter to accept their drafts, or they would subject themselves to an action for damages for not accepting them. The plaintiffs had the right, and were bound to accept, all bills presented, which appeared to be drawn conformably to the instructions, unless provided with indemnity, or furnished with evidence of ill faith on the part of Rodewald & Co. (*Boyce v. Edwards*, 4 Peters, 3. *Ontario Bank v. Worthington*, 12 Wend. 593, 598. *McEvers v. Mason*, 10 John. 215. *Pillans v. Mierap*, 3 Bur. 1663, 1669. *Story on Bills*, § 269. 1 R. S. 768, § 10, *Edm. ed. p. 768*. *Johnson v. Clark*, 39 N. Y. 216. *Barney v. Worthington*, 37 id. 112, 116. *Blakiston v. Dudley*, 5 Duer, 378, 575.) The defendant is therefore bound to indemnify the plaintiffs from all the legal consequences of their compliance with his request.

IV. The legal relations of the parties to a letter of credit are the same as those of principal and agent, *mandator* and *mandatory*, and all the rights and obligations of either are determined by the rules of the law of agency. In the continental jurisprudence of Europe, in France, Germany and other states, the law applicable to letters of credit is treated of under the head of "*mandate*." In the case at bar, the defendant Quentell is the

Gelpcke v. Quentell.

mandator, and the plaintiffs are the mandatories, and the letter of credit of the defendant was the power of attorney or mandate. The rule in regard to the interpretation of such powers has been recognized to be, that if a power be ambiguous, and is reasonably construed by the agent, the principal is bound, though it should prove not to have been the construction intended by the principal. (*Le Roy v. Bayard*, 8 How. U. S. 491.) The agent may do what seems from the instrument plausible and correct, and though it turn out in the end to be wrong as understood by the principal, the latter is still bound by the conduct of the agent. If language be ambiguous, so as to mislead, the injurious consequences should fall on the principal for not employing clearer terms. (*Lomax v. Cartwright*, 3 Wash. C. C. 156. *Story on Agency*, §§ 72, 74, 75.) If the defendant intended that the plaintiffs should accept and pay only bills drawn against consignments made or procured by his agents in New Orleans, and that the plaintiffs should see to it that they were so drawn, he, the defendant, ought to have stated so, distinctly, in his letter, and made it a condition precedent, and he ought not to have deprived the plaintiffs of the only means, the bills of lading, by which they could ascertain such a fact. The plaintiffs had the right and were bound to accept the bills when presented, because the bills were apparently in all respects in conformity with the instructions of the defendant.

V. Even though the bills of exchange, drawn by Rodewald & Co., the agents of the defendant, were not drawn against consignments, but were apparently drawn in conformity with the letter of credit, and apparently within the scope of the agency of Rodewald & Co., and the plaintiffs did not know otherwise but that they were so drawn, the plaintiffs had a right to presume that they were drawn against consignments, and that they were bound to accept and pay them. It is a general rule that

Gelpcke v. Quentell.

he who employs an agent shall lose by his fraudulent, negligent or illegal act, rather than an innocent person. The court, in *Dunning v. Roberts*, (35 Barb. 463,) says: "It is a universal rule based on principles of policy, propriety and justice, that if a principal put his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, he shall be bound by his acts. By employing him, he warrants his competency, fidelity, and good conduct in all matters within the scope of his agency."

And it is said by Allen, J., in *Johnson v. Jones*, (4 Barb. 369, 373,) "an agent may bind his principal within the limits of the authority with which he is apparently clothed with respect to the subject matter. The liability of a principal is rather to be determined from the authority he allows his agent to assume, than from that which the agent actually receives." (See *Story on Agency*, §§ 130-133; *Perkins v. Wash. Ins. Co.* 4 Cowen, 645; *Com. Bank of Lake Erie v. Norton*, 1 Hill, 501.) In the case at bar, the plaintiffs were not bound to see to it, whether the agents of the defendant, Rodewald & Co., properly applied the advances or not, that is, whether they used them for advances on consignment of goods to the defendant. Rodewald & Co. were to act solely under the instructions of Quentall, which instructions the plaintiffs had nothing to do with, and as long as the plaintiffs paid *bona fide* bills of Rodewald & Co., which were apparently drawn within their power, the defendant became liable to the plaintiffs, though Rodewald & Co. applied the funds contrary to the instructions of their principal, Quentell. (*Cremer v. Higginson*, 1 Mason, 323, 335.)

VI. The letters of advice of Rodewald & Co. state explicitly and represent that the drafts mentioned were drawn on account of the credit opened by the defendant, and these agents of the defendant have thereby in each case made a representation as to a fact essential to their

Gelpcke v. Quentell.

power, upon the faith of which the plaintiffs have acted, and the defendant, the principal, is precluded from controverting the faith so represented, and he is estopped by the representation of his agents, Rodewald & Co., from disputing facts which show that the act was authorized. (*Griswold v. Haven*, 25 N. Y. 595, 603. 16 *id.* 136.) Since the letters of advice of Rodewald & Co. refer to the credit opened by Quentell, it is in effect the same as if the letters of Quentell and the plaintiffs had been set out in full, and Rodewald & Co. desired the advances for Quentell in conformity with his construction. Bronson, J. in *Birkhead v. Brown*, (5 Hill, 639,) says: "It is neither usual nor can it be necessary for business men to make express reference, in every new communication, to that which has gone before; nor can it be necessary in making new modifications of an existing arrangement, to repeat the terms of the original agreement. These letters must all be read and construed together, as forming but one contract or arrangement." The plaintiffs had all reason to suppose from the representations of Rodewald & Co., in their letters of advice, that the bills were drawn in conformity with their power and the design of Quentell, and the latter had prevented them from ascertaining whether these representations were true or not, by withholding from them the bills of lading.

VII. The defendant would be estopped from denying that the bills of exchange, drawn by his agents Rodewald & Co., were actually drawn for advances on consignments addressed to the defendant, because the bills were drawn within the apparent authority of Rodewald & Co., and the plaintiffs were not bound to inquire into the facts *aliunde*. The rule of law controlling all these cases is laid down in the case of *The North River Bank v. Aymar*, (3 Hill, 262,) where Cowen, J. says: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with

Gelpcke v. Quentell.

the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*; the apparent authority is the real authority." In the case of *The Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, (16 N. Y. 125, 135,) Selden, J. says: "It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds, in every particular, in regard to which such party has, or is presumed to have, any knowledge, with the terms of the power, he may take the representations of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it." (See also, *Griswold v. Haven*, 25 N. Y. 595, 603; *Bank of Genesee v. Patchin Bank*, 3 Kern. 309.)

VIII. The bills of exchange offered in evidence at the trial were improperly excluded as not within the instructions of the defendant. The judgment should be set aside, and a new trial ordered.

M. S. Bidwell, for the respondent.

I. The only authority which the plaintiff had to pay bills of exchange drawn by Rodewald & Co. on the defendant's account, was contained in his letter to them, dated 24th December, 1859. That was a special authority; it constituted them agents for a special purpose, not the defendant's general agents. (*Marius*, 35, 36, 37, cited in *Story on Bills of Exchange*, § 460. *Schimmelpennick v. Bayard*, 1 *Peters*, 283.) The plaintiffs could bind the defendant only by a strict compliance with the terms and conditions of this special authority. (*Batty v. Carswell*, 2 *John*. 48. *Davenport v. Buckland*, *Lalor's Sup.* 75. *Nixon v. Palmer*, 4 *Seld.* 398, 400. *Allen v. Ogden*, 1 *Wash. C. C.* 175, 176. *Schimmelpennick v. Bayard*, 1 *Peters*, 283, 290. *Mayor of Little*

Gelpcke v. Quentell.

Rock v. State Bank, 3 Ark. 227. *Berkley v. Watling*, 7 Ad. & El. 29. *Alexander v. Mackenzie*, 6 C. B. 766. *Grant v. Norway*, 10 id. 665. *Stagg v. Elliott*, 12 id., N. S., 373. 1 Pars. on Ship. 187, n.)

II. This authority is of no greater force or effect than a direction or authority would be if given by the defendant to his clerk in these words: "You may accept bills of exchange drawn on me by Rodewald & Co. for advances on consignments of merchandise to my address, and it is not necessary that the bills of lading should accompany the advice of the bills of exchange." No one can suppose that such clerk would be authorized to accept bills drawn by Rodewald & Co., if no consignments of merchandise had been made to the defendant's address.

III. To sustain this action, therefore, it was necessary for the plaintiffs to show that the bills were drawn against consignments; in other words, to show that the authority had been strictly complied with. The defendant intended to authorize the payment of such bills alone. (*Mason v. Hunt*, 1 Doug. 297. *Schimmelpennick v. Bayard*, 1 Peters, 288.)

IV. That this was his intention, is deducible not only from the express language of the letter of credit, and its obvious and natural meaning, but from the nature of the transaction itself. (*Mason v. Hunt*, 1 Doug. 297.) It would be unreasonable to suppose that the defendant would authorize the plaintiffs to advance \$50,000 on his account to Rodewald & Co., unless he received security; especially when the very object of such advance was to procure consignments of merchandise to his address.

V. Rodewald & Co. were under no obligation to undertake the business, but if they did undertake it, they had no right to draw bills on the plaintiffs on the defendant's account, for any other purpose; and if they drew such bills without having procured such consignments, they were guilty of dishonest and fraudulent conduct. And

Gelpcke v. Quentell.

the plaintiffs had no authority from the defendant to accept or pay any bills except such as were drawn against consignments. The plaintiffs' duty was plain, and could have been performed without difficulty.

VI. It is true that it was not required that the bills of lading should accompany advice of the bills of exchange. This, however, did not imply that there must be no bills of lading, but the very reverse. It implied that there were to be bills of lading, and this was in perfect harmony with the fact that the bills were to be drawn against consignments. The defendant's letter implied that the bills were to be drawn only against consignments, and that there were to be bills of lading, although it was not necessary that they should be forwarded with the letters containing the advice of the bills having been drawn. It would be sufficient to forward them with the bills themselves; a mode of proceeding well calculated to facilitate the sale of the bills of exchange. If the defendant had not stated in his letter to the plaintiffs, that it was not required that the bills should accompany the advice of the bills, and had written merely that the credit was to be used for advances on consignments to his address, would it not have been apparent that Rodewald & Co. would have had no right to draw, unless for advances on consignments to the defendant's address, and that the bills of lading must be sent so as to secure to the defendant the possession and control of such consignment, as otherwise the defendant would have no security for his reimbursement, or for the commissions to which he would be entitled on such consignments. (*Rawls v. Deshler*, 3 *Keyes*, 572.) But, in truth, this consent, that the bills of lading might not accompany the bills of exchange, strengthens rather than weakens the defense; for it implies plainly that there were to be bills of lading, and that they were to be sent before the bills of exchange were paid, for otherwise such bills

of lading would be of no service for the defendant's protection.

VII. It was alleged by the plaintiffs, in the complaint, that the bills drawn by Rodewald & Co. were taken by certain persons on the faith of the letter of credit, and for a valuable consideration. But there was no proof of either of these allegations. The case, therefore, is the same as if the bills had been paid by the plaintiffs directly to Rodewald & Co., or, (as may have been the case,) to their agents.

VIII. Indeed, if the holders of such bills had seen the letter of credit, they would have been informed that Rodewald & Co. had no authority to draw except against consignments. (*Stagg v. Elliott*, 12 C. B., N. S., 373.)

IX. But the plaintiffs did prove that they had not committed themselves before they paid the bills. The payments, therefore, were, on their part, voluntary and gratuitous, and were made to persons who do not appear to have been *bona fide* holders for value of such bills of exchange.

X. There was no attempt to prove that consignments had been made to the defendant, and the maxim applies, *de non apparentibus, &c.*

By the Court, CARDOZO, J. Whether the ruling of the judge below was right, or not, depends upon the construction to be given to the letter of the defendant to the plaintiffs of the 24th of December, 1859. The question is whether the general authority first conferred by that letter is restricted by the subsequent clause which says: "This credit is intended for advances on consignments of merchandise to my address, and you will please to keep the same in force for the coming year, 1860. It is not, however, required that bills of lading accompany the advice of the drafts." Did this make it the duty of the plaintiffs to see, before they accepted the drafts, that they were

Gelpcke v. Quentell.

drawn against consignments made to the defendant's address. I think not. It seems to me that the clause of the letter relied upon to limit the authority to accept, to drafts drawn against consignments to the defendant, has not that effect. Its purpose was to inform the plaintiffs of the reason which induced the defendant to have the same kept in force for a year. But the defendant showed that he did not mean to charge the plaintiffs with the duty of seeing that the drafts were drawn against consignments, by informing them that it was "not required that bills of lading should accompany the advice of the drafts." Instruments of this character should be construed as the parties to whom they are addressed might fairly and reasonably be expected to understand them. It seems to me that the only reasonable meaning of this paper is, that the plaintiffs were not called upon to have the bills of lading when they accepted the drafts; and if this construction be right, then, clearly, the information contained in the letter was not intended to make it the duty of the plaintiffs to ascertain that the drafts were drawn against consignments; because the very means of so ascertaining were dispensed with, and when drafts apparently within the authority were presented to them they had no alternative but to accept them. That the clause "it is, however, not required that bills of lading should accompany the advice of the drafts," should be construed as dispensing with the necessity of the bills of lading accompanying the drafts themselves, seems to me to follow from the consideration that it should be construed, as I have said, as the parties to whom it was addressed would be likely to understand it. Now, I cannot see how the plaintiffs could have understood the defendant as merely meaning that they might dispense with something which was only for their accommodation and convenience, and in which the defendant had no interest at all. The advice that drafts were on their way was a matter that could make no

Dod v. Fourth National Bank of New York.

difference to the defendant, but might be a matter of convenience to the plaintiffs, to enable them to be prepared to accept the drafts. For the defendant to say to them, I dispense with that which does not concern me, but which you have the right according to mercantile custom to expect, would be meaningless and absurd; but if he said, I do not require you to exact that bills of lading should accompany the drafts, then it would have some meaning and effect. In that way, I think, his letter should be read; and so read, there seems to me to be no doubt that the plaintiffs, acting in good faith, were not bound to ascertain that the drafts which were apparently within the terms of the authority, were, in fact, drawn against actual consignments to the address of the defendant. For these reasons, I think the ruling below was erroneous, and that the judgment should be reversed and a new trial ordered; costs to abide the event.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingram*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

DOD vs. THE FOURTH NATIONAL BANK OF NEW YORK.

The plaintiff delivered to the First National Bank of New Orleans a draft on New York city, and the same was, in the ordinary course of business, sent by that bank to the defendant, its correspondent in New York, for acceptance and collection. The New Orleans bank failed, and its receiver gave the plaintiff an order for the draft, on the defendant, which it declined to accept, claiming to hold the draft under an agreement with said bank, by which the defendant was to hold all collection paper as collateral against overdrafts, and alleging that it had parted with money on the faith of such draft. *Held* that the evidence to show that any specific loan was made on the faith of the draft, being wholly unsatisfactory, the claim of the defendant could not be sustained, and the case fell within the authority of *Lindauer v. The Fourth National Bank*, (55 Barb. 75.)

The decision in *Dickerson v. Watson*, (54 Barb. 230,) should not be extended to any case not falling within the facts of that case.

Dod v. Fourth National Bank of New York.

THIS action was brought to recover the proceeds of a draft for \$821.91, received by the defendant under the following circumstances: On April 15, 1867, the plaintiff was in New Orleans, Louisiana, and had then in his possession a draft for \$821.91 on Spence, Montague & Co. of New York city, drawn by Francis P. Drain, at Havana, March 30, 1867, payable to the order of the plaintiff, sixty days after date, of which draft the plaintiff was the owner, and on that day he delivered said draft to the cashier of the First National Bank of New Orleans for acceptance and collection. Said draft was received by said First National Bank for acceptance and collection, and entered in its foreign collection book, and on the same day was sent in a letter to the defendant, at New York, for acceptance and collection; and on its transmission as aforesaid, it was indorsed by the plaintiff, and it was also indorsed by the cashier of said First National Bank to the defendant for collection on account of said First National Bank. And said draft was afterwards received by the defendant and presented to the drawees for acceptance, and accepted April 20, 1867, and on June 22, 1867, the defendant collected said draft and received from the drawees the proceeds thereof, \$821.91. On June 1, 1867, the said First National Bank having failed and gone into liquidation, and a receiver having been appointed of all its assets, said receiver delivered to the plaintiff an order on the defendant to deliver said draft or its proceeds to the plaintiff. Before the draft became due, said order was presented to the defendant by Joseph W. Ryan, acting on behalf of the plaintiff, and said draft duly demanded. And, at the same time, Ryan presented to the cashier of the defendant a letter signed by the plaintiff, notifying such cashier to make no discount or other use of said draft.

Said Ryan saw both the president and cashier of the defendant, and the president said that the First National Bank was indebted to the Fourth National Bank about

Dod v. Fourth National Bank of New York.

\$40,000, and he was not disposed to give up the draft, but he did not say anything about having made any advances upon it, or about the draft having been pledged by the First National Bank to them. After the defendant had collected the draft as aforesaid, and before the commencement of this action, the proceeds thereof were duly demanded of them by the plaintiff, but said proceeds have never been paid over to the plaintiff, and are still held by the defendant. The general course of business between the two banks was as follows: The First National Bank bought exchange in New Orleans, and sent it to the defendant and drew against it, but the business of the draft in question was separate from that business, as it was forwarded simply for collection. On its receipt by the defendant it was entered in its register for collection drafts, and was never credited to the First National Bank until after it was collected, June 19, 1867. On April 20, 1867, the day the defendant received said draft, the First National Bank had overdrawn its account on the defendant about \$100,000. On May 22, 1867, it was overdrawn only from \$50,000 to \$60,000; and on May 11, 1867, it was about the same. It was claimed by the defendant that it made specific advances on the faith of this particular draft. Upon this question the evidence was not entirely clear. The bank never knew of its existence until it was received. And there is no evidence that the defendant ever, in any way, advanced any money to the First National Bank, after it received this draft. By the testimony of Billopp Seaman, cashier of the defendant, it appeared that the defendant had an understanding or agreement with one A. C. Graham, who assumed to act as the agent in the city of New York of the First National Bank, that the defendant should hold all collection paper in its hands, as collateral against overdrafts; but at what particular time this agreement was made did not appear, and the agency of Graham was not shown, and it appeared that the de-

Dod v. Fourth National Bank of New York.

fendant never advised or apprised the First National Bank of that understanding with Mr. Graham.

The cause was tried before Hon. John R. Brady and a jury, on May 9, 1870. When the plaintiff rested, the defendant moved to dismiss the complaint upon the following grounds: That there was no privity established between the plaintiff and the defendant; that the plaintiff was in no position to maintain this action as against the defendant; and that whatever claim the plaintiff had was against the First National Bank of New Orleans, and against it only. The court denied the motion, and the defendant excepted. The court directed the jury to find a verdict for the plaintiff for the amount claimed in the complaint, to which direction the defendant excepted, and the court directed the exceptions to be heard in the first instance at the general term, and the plaintiff now moved for judgment on said verdict.

J. H. & B. F. Watson, for the plaintiff.

I. An objection was taken by the defendant at the trial, that there was no privity between the plaintiff and the defendant; that the defendant was not the agent of the plaintiff, but of the First National Bank, which was the agent of the plaintiff; and the following cases were cited: *Costigan v. Newland*, (12 Barb. 456;) *Colvin v. Holbrook*, (2 Comst. 126;) *Montgomery Co. Bank v. Albany City Bank*, (3 Selden, 459;) *Denny v. Manhattan Co.*, (2 Denio, 115.) This objection is entirely untenable, and none of said decisions cover the case at bar. The last two of them merely decide, that for negligence or misconduct in the course of his agency, an agent is responsible to no one but his principal; and all that the first two decide is, that where an agent rightfully receives money for his principal which ought to be paid over to a third person, such third person cannot maintain an action against the agent for the recovery thereof; though the agent has never, in fact, paid it

Dod v. Fourth National Bank of New York.

over to his principal, and though the agent had notice of the claim made by such third person. These cases proceed on the ground that the agent owes a duty to his principal, and that he cannot be subjected to claims set up by third parties, conflicting with those of his principal; but the case at bar is very different. The First National Bank, by the action of its receiver, in giving the plaintiff the order on the defendant, of June 1, 1867, to deliver to him said draft or its proceeds, had parted with all its interest therein; and the defendant collected said proceeds, after the presentation to it of said order, and its refusal to comply therewith, and, consequently, may be said to have received in its own wrong the money of the plaintiff, and is legally bound to pay the same over to him, and to no one else. Again, the letter from Spencer, Montague & Co. to the president of the defendant, and which accompanied the check by which the draft in suit was paid, shows that the defendant did not receive the money as the agent of the First National Bank; but having received this letter with the check, and there being no evidence that it ever replied to this letter, it must be deemed to have acquiesced in its contents (as to which, see 1 *Greenl. Ev.* § 197,) and thus, in the language of the letter, to have agreed to hold the money, subject to the demand of the rightful owner.

Again, even had this money been rightfully received by the defendant as the agent of the First National Bank, yet the foregoing decisions do not apply to this case, and the defendant not having paid over the money to the First National Bank, the plaintiff, by the following decisions, is entitled to maintain this action against them. (*Arnold v. Clark*, 1 *Sandf.* 491. *Bank of Orleans v. Smith*, 3 *Hill*, 560.)

II. The evidence shows conclusively that this draft was the property of the plaintiff; that it was delivered by him to the First National Bank for collection, and by the First National Bank forwarded to the defendant for collection; and the only question in the case is, whether the defend-

Dod v. Fourth National Bank of New York.

ant, by making advances upon it to the First National Bank, has acquired any interest in, or lien upon it, so as to enable it to hold its proceeds as against the plaintiff.

That they have not acquired any such lien or interest is evident for the following reasons: 1. There is no evidence of any express agreement that the defendant should have a lien upon the paper sent to it for collection by the First National Bank. The evidence to that effect was disregarded by the jury, under the direction of the court, and even had there been sufficient evidence of an agreement such as that testified to by the defendant's cashier, yet it was clearly void; for, it was an agreement, "that they should hold all collection paper in their hands as collateral against over-drafts;" in other words, it was an agreement that they should hold the property of third persons as collateral against the over-drafts of the First National Bank; for, as was said in *Van Namee v. The Bank of Troy*, (5 How. Pr. 170,) a bank must know that a large part of the paper received from its correspondents is placed there for the sole purpose of collection, which is sufficient notice to put it upon inquiry, and to prevent it from relying upon such paper as security for advances or for a balance; but here would be an express agreement to hold securities as to which it had express notice that they were not the property of its correspondent. Its defense, then, must be sustained, if at all, on the ground of its general lien as a banker. 2. The defendant never knew of the existence of this draft until it received it, and there is no evidence that it advanced any money to the First National Bank after the receipt of said draft. The only evidence on the subject is that of the defendant's cashier, who says that on April 20, 1867, the day of such receipt, the account of the First National Bank on his bank was overdrawn about \$100,000; and again, that on said 20th of April the defendant advanced to said First National Bank \$2985, and that said advance was made through the clear-

Dod v. Fourth National Bank of New York.

ing house, at about half past ten o'clock in the morning; but he says that he does not remember at what time of day the draft in question was received by his bank. Might it not have been after said advance was made, and after said account was overdrawn as aforesaid, and how, then, can the defendant be said to have made any advance on this draft. Again, he says that he does not know at what time of day the draft was accepted, and that they made an advance upon it before they knew whether it was going to be accepted or not, which looks extremely improbable, and leads to the inference that this advance, if made at all, was made before they received the draft in question, and without any reference to it whatsoever; and, moreover, the inconsistency of the cashier's testimony is apparent, for he says that on April 20, 1867, the account of the First National Bank was overdrawn about \$100,000; that on May 22d it was overdrawn between \$50,000 and \$60,000, and that on May 11, it was about the same, and yet that between April 20 and May 11 it increased. 3. But even conceding that said advance was made, and said account or some part thereof overdrawn after the receipt by the defendant of said draft, yet there is no evidence to show that any specific advance was made on the faith of this particular draft; for it certainly does not appear what part of said \$100,000 was overdrawn on April 20, 1867, and by the evidence of said cashier it appears that in making said advance, they were advancing upon other drafts at the same time, and unless there was such a specific advance made, the defendant did not acquire any lien on, and is not entitled to hold this draft, or its proceeds, as against the plaintiff. (*Van Namee v. Bank of Troy*, 5 How. Pr. 161. *McBride v. Farmers' Bank*, 25 Barb. 657; affirmed 26 N. Y. 450. *West v. American Exchange Bank*, 44 Barb. 175. *Commercial Bank of Clyde v. Marine Bank*, 3 Keyes 337. *Lindauer v. Fourth National Bank*, of N. Y. 55 Barb. 75.) The case last cited is even stronger than the case at bar, for there

Dod v. Fourth National Bank of New York.

the agreement between the defendant and the New Orleans Bank, to allow the latter to overdraw its account, and the defendant to hold its remittances for collection as collateral, &c., was proved, and it was also proved that the defendant did make advances after the receipt of remittances in which the draft in question in that case was included. The case of *Dickerson v. Wason*, (48 Barb. 412; 54 *id.* 230,) cannot be regarded as an authority to the contrary, for by reference to that case it will be seen that it is very different from the present one; as in that case the only business that the defendants did for Van Saur & Son was to make collections for them. July 24, they received the note in controversy, and on August 27, 1863, they collected it, and on this day Van Saur & Son stopped payment. Wason had sent them money enough to cover the proceeds of all collections that they had made for them, including the note in controversy, and leaving them indebted to Wason in a balance of \$5.82; and it was held that Wason was entitled to retain the proceeds of the note. It was not necessary that the specific proceeds of collections should be sent. 4. The draft in question was never in any way pledged or assigned to the defendant. It was simply indorsed to it for collection, and as it is well known among bankers that a large part of the paper received by them from their customers for collection is the property of third persons, there were facts sufficient to put it upon inquiry as to the ownership of the draft in question; and moreover, the facts in this case show positive notice to it that the draft was not the property of the First National Bank; and when it received it, it entered it in its register for collection drafts, and it was not entered in the account of the First National Bank, either as debit or credit, until after it was collected, and it had notice of the plaintiff's claim, which shows that the defendant did not regard it as the property of the First National Bank, and that it is not a *bona fide* holder for value. (*McBride v. Farmers'*

Dod v. Fourth National Bank of New York.

Bank; Van Namee v. Bank of Troy, supra. Arnold v. Clark, 1 Sandf. 491.)

Livingston K. Miller, for the defendant.

I. There was no privity between the plaintiff and defendant. The defendant was not the agent of the plaintiff, but of the New Orleans bank, which, in its turn, was the agent of the plaintiff. The defendant owed no duty to the plaintiff. This, under the decisions, is a fatal objection to the plaintiff's right to recover. (*Costigan v. Newland*, 12 Barb. 456. *Denny v. The Manhattan Co.*, 2 Denio, 115, affirmed in Ct. of Errors, 5 id. 639. *Colvin v. Holbrook*, 2 Comst. 126. *Montgomery Co. Bank v. Albany City Bank*, 3 Seld. 459.) In *West v. Am. Ex. Bank*, (44 Barb. 175,) it is conceded that it would have been a good point if it had not been waived by the answer.

II. The plaintiff might, perhaps, have brought replevin. If not, his only remedy was against the New Orleans bank, or its receiver. There is no contract, express or implied, upon which this form of action can be sustained in behalf of this plaintiff against this defendant. These points, if sustained, are decisive of the whole appeal.

III. The other question in this case is, had the defendant a right to retain the proceeds of the draft in question as against the debts of the New Orleans bank to it? Under the decisions of the U. S. courts this right could not be questioned. It could be held under the general bankers' lien for antecedent advances, even had there been no advances or no credit given on the faith of said remittances. (*Bank of the Metropolis v. New England Bank*, 1 How. U. S. 234. 6 id. 212. *Swift v. Tyson*, 16 Peters, 1.) This ruling has not been followed to its full extent in our State courts, and the rule, as established by the various decisions in this State, seems to be, that in order that the receiving bank may retain moneys so received, it must be made to appear either, 1. That the receiving bank has

Dod v. Fourth National Bank of New York.

given absolute credit to the remitting bank for the draft when received, without waiting for its collection; or, 2. Must have paid something, parted with some value, on the faith of it.

IV. We claim that the second requirement has been fully met. The facts in this case are not involved in any dispute. The defendant did make payments on the faith of it.

V. The following cases go to establish the right of the plaintiff to hold the draft in question: (*Stalker v. McDonald*, 6 Hill, 93. *Market Bank v. Hartsborne*, 3 Keyes, 137. *McBride v. Farmers' Bank*, 26 N. Y. 451,) where it was held that the defendants could not retain the money because they had given nothing, parted with no value, leaving it to be inferred that, had they given anything, parted with value, as in this case, they could have retained it. *Commercial Bank of Clyde v. Marine Bank*, (3 Keyes, 337,) is to the same effect; the defendants could not retain the draft because they had not parted with value. In the present case they had, and therefore the rule does not apply.

VI. *Dickerson v. Wason*, (54 Barb. 230,) is a case nearly identical in principle with the present, and it seems to us conclusive on the question.

VII. It may, perhaps, be claimed that the case of *West v. Am. Ex. Bank*, (44 Barb. 175,) is authority against the defendant. It is in some respects like the present; but it will be observed that the court expressly put the plaintiff's right to recover upon the ground that "it is not found that the defendant paid said drafts upon the credit or faith of the note in question, or of its proceeds?" and citing *McBride v. The Farmers' Bank*, (26 N. Y. 450,) they say: "without this, the subsequent advances are insufficient to sustain the defendants' claim." Now, in the present case, it is in evidence, uncontradicted, that the defendant did make advances upon the faith of this draft, and therefore the case does not apply.

Nicoll *v.* Fash.

By the Court, CARDOZO, J. I think the evidence given by the defendants would not have justified a verdict that they had parted with any money upon the faith of the draft which had been sent to them for collection, even if, which they did not, they had asked the circuit judge to submit that question to the jury. I know that the cashier swears generally to having advanced on this and other drafts; but I think when all his evidence is considered, it is wholly unsatisfactory to support such a theory as that any specific loan was made on the faith of this draft. That being so, the case falls within the authority of *Lindauer v. Fourth National Bank*, (55 Barb. 75,) and the ruling below should be sustained.

I am not in favor of extending *Dickerson v. Wason*, (54 Barb. 230,) to any case which does not fall precisely within the facts of that decision.

The exceptions should be overruled, and judgment ordered for the plaintiffs upon the verdict, with costs.

Judgment for the plaintiffs.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

FRANCES B. NICOLL *vs.* MARY FASH.

Where, in an action brought to recover dower, the defense is that the premises have been sold for taxes, and the defendant claims under the tax sale, and a lease or conveyance thereof from the corporation, the answer must aver the various matters which it will be necessary for the defendant to prove, to establish the validity of the lease; otherwise it will be bad, on demurrer.

Where, conceding the truth of an answer, the defendant would not be entitled to judgment, because other facts, not averred, would need to be proven, to establish the defense, the omission to plead those facts will prevent his giving evidence to support them. Hence the answer is defective.

Where a defendant, in his answer, states several defenses separately, and num-

Nicoll v. Fash.

bers them, thus showing that he meant to plead them as separate and distinct defenses, he cannot afterwards be allowed to assert that they are not so, and that a portion of the answer demurred to is merely introductory to another clause not demurred to.

A PPEAL from an order made at a special term, overruling a demurrer to portions of the defendant's answer.

The action was brought to recover dower in certain premises in the city of New York, in the possession of, and claimed by, the defendant.

The complaint alleged that Edward A. Nicoll intermarried with the plaintiff in the city of New York, in the year 1818. That afterwards, and while the plaintiff was the wife of said Edward A. Nicoll, he became and was seised in fee of, among other real estate, all those four lots of land in the city of New York, [describing them particularly.] And afterwards, and in or about the year 1850, the said Edward A. Nicoll departed this life, leaving the plaintiff him surviving. That the defendant was in possession of, and claimed to own, the aforesaid premises, or some interest therein. That while the defendant claimed to be, and was, so possessed or interested, as aforesaid, and before the commencement of this action, the plaintiff demanded of the defendant her dower in said premises as widow of said Edward A. Nicoll, deceased, and the defendant neglected and refused, and still neglects and refuses, to assign said dower to her. Wherefore the plaintiff demanded judgment that she is entitled to dower in said premises, together with the damages by her sustained, by reason of the withholding thereof by the defendant.

The portions of the answer demurred to were as follows :

"*Fourth.* The defendant further answering, shows that on or about the 13th day of October, 1847, a certain tax was levied, imposed and assessed, and duly confirmed, upon the real and personal estate of the freeholders and inhabitants of, and situate within, the said city and county of New

Nicoll v. Fash.

York, including the premises set forth in the complaint, by the mayor, recorder and aldermen of the city of New York, as the supervisors of the city and county of New York, under and in pursuance of an act of the legislature of the State of New York, passed May 12th, 1847, entitled "An act to enable the supervisors of the city and county of New York to raise money by tax," and for the purpose set forth in said act; that the proportion of such tax levied, assessed and imposed upon the premises described in the complaint was the sum \$3.12, which sum was assessed upon the whole of said premises collectively, and said tax became thereupon a legal and valid lien thereon. That thereafter the proportion of said tax justly chargeable to the lot referred to in said complaint as lot No. 679, to wit, the sum of seventy-eight cents, was paid.

Fifth. The defendant further shows that on or about the 10th day of October, 1848, a certain tax was levied, imposed and assessed, and duly confirmed, upon the real and personal estate of the freeholders and inhabitants of, and situate within, the said city and county, including the premises set forth in the complaint, by the mayor, recorder and aldermen of the city of New York as the supervisors of the city and county of New York, under and in pursuance of an act of the legislature of the State of New York, passed April 12, 1848, entitled "An act to enable the supervisors of the city and county of New York to raise money by tax," and for the purpose set forth in said act; that the proportion of such tax levied, assessed and imposed upon the premises described in the complaint was the sum of \$3.26, which sum was assessed upon the whole of said premises collectively, and said tax became thereupon a legal and valid lien thereupon.

Sixth. That thereafter the proportion of said tax justly taxable to the lot referred to in said complaint as lot No. 679, to wit, the sum of eighty-two cents, was paid. That no part of the taxes aforesaid, for 1847 and 1848, on the

Nicoll v. Fash.

remaining lots, was paid, and remaining so unpaid, said remaining lots, being the lots referred to in said complaint as lots Nos. 628, 629 and 678, were on the 19th day of December, 1850, pursuant to law, and after due and proper notice, and advertisement and adjournment, at the city hall, in the city of New York, by the comptroller of the said city of New York, sold at public auction, to one Francis S. Craft, for said taxes, for the term of fifty years, in consideration of his advancing the amount due for said taxes, with the interest, costs and charges accrued thereon, being the sum of \$7.55, and said term of fifty years being the lowest term of years at which any person offered to take the said premises in consideration of making such advances as last mentioned.

That thereupon said Francis S. Craft paid to said comptroller the said sum of \$7.55, and received from said comptroller a certificate of such sale.

Seventh. That said premises were not redeemed from said sale before or after the expiration of two years from the date thereof, and on the 20th day of December, 1852, a lease or conveyance of said lots 628, 629 and 678 was duly executed and delivered under their corporate seal by the mayor, aldermen and commonalty of the city of New York, according to law, to said Francis S. Craft, for the said term of fifty years from December 19th, 1850.

That thereafter the said Francis S. Craft served the notices required by the third section of the act of the legislature of the State of New York, entitled "An act in addition to the acts respecting the collection of taxes and assessments in the city and county of New York," passed May 25th, 1841, and the sixth section of the act amendatory of the same, entitled "An act to authorize the mayor, aldermen and commonalty of the city of New York to purchase lands for taxes and assessments in certain cases, and for other purposes," passed April 18th, 1843, and filed affidavits duly certified, showing such services, with copies

Nicoll v. Fash.

of the notices served, in the office of the comptroller of the city of New York, as required by law, and six months elapsed from the time of service of such notices, and said premises were not redeemed, whereupon such lease or conveyance aforesaid, to said Craft, became absolute.

Eighth. That thereafter, and on the 18th day of August, 1853, the said lease or conveyance was duly assigned, by instrument in writing, executed, acknowledged and delivered, by said Francis S. Craft to one Andrew Fash. And the defendant further shows, that said Andrew Fash entered into possession of said premises, and continued in the occupation thereof, under said lease, until his decease, as hereinafter stated.

Ninth. And the defendant, further answering, shows, that on or about the 20th day of July, 1853, a certain tax was levied, imposed and assessed, and duly confirmed, upon the real estate of the freeholders and inhabitants of, and situate within, the said city and county of New York, including the lot forming part of the premises described in the complaint herein, and therein designated as lot No. 679, by the board of supervisors of the city and county of New York, under and in pursuance of an act of the legislature of the State of New York, passed April 15, 1853, entitled "An act to enable the supervisors of the city and county of New York to raise money by tax," and for the purposes set forth in said act; that the proportion of such tax levied, assessed and imposed upon the said lot, No. 679, described in the complaint, was the sum of \$3.62, and said tax became a valid lien thereupon.

Tenth. That no part of said tax being paid, and the same remaining unpaid, the said lot was, on the 24th day of November, 1859, pursuant to law, and after due and proper notice, and advertisement and adjournment, at the city hall, in the city of New York, by the clerk of arrears, under the direction of the comptroller of the city and county of New York, sold at public auction, to one

Nicoll v. Fash.

Andrew Fash, for said taxes, for the term of one hundred years, in consideration of his advancing the amount due for said taxes, with the interest and costs and charges accrued thereon, being the sum of \$4.97; and said term of one hundred years being the lowest term of years at which any person offered to take the said premises, in consideration of making such advances as last above mentioned. That thereupon said Andrew Fash paid to said comptroller said sum of \$4.97, and received from said comptroller a certificate of such sale. That said premises were not redeemed from said sale before or after the expiration of two years therefrom, and on the 26th day of November, 1861, the mayor, aldermen and commonalty of the city of New York executed, under their corporate seal, a lease or conveyance of said premises, according to law, to said Andrew Fash, for the said term of one hundred years from the 24th day of November, 1859.

Eleventh. That thereafter the said Andrew Fash served the notices required by the third section of the act of the legislature of the State of New York, entitled "An act in addition to the acts respecting the collection of the taxes and assessments in the city of New York," passed May 25th, 1841, and the 6th section of the act amendatory of the same, entitled "An act to authorize the mayor, aldermen and commonalty of the city of New York to purchase lands for taxes and assessments in certain cases, and for other purposes," passed April 18, 1843, and filed in the office of the comptroller of the city and county of New York, affidavits duly certified, showing such services, with copies of the notices, as required by law, and six months elapsed from the time of such services of notices and said premises were not redeemed, whereupon such lease or conveyance aforesaid to said Fash became absolute. And the defendant further shows, that said Andrew Fash entered into possession of said lot, and continued in the

occupation thereof, under said lease, until his decease, as hereinafter stated.

Twelfth. And the defendant further shows, that the said sale, first herein above mentioned and set forth, was made under and in pursuance of an act of the legislature of the State of New York, entitled "An act for the collection of taxes in the city of New York," passed April 18, 1843, and an act of said legislature entitled "An act to enable the receiver of taxes in the city of New York, and the comptroller of said city, to collect the taxes remaining unpaid," passed May 14, 1845; and that the sale secondly above set forth was made under and in pursuance of an act of the legislature of the State of New York, entitled "An act for the collection of taxes in the city of New York," passed April 18, 1843; an act of the same legislature, entitled "An act to amend an act entitled 'An act to create the Croton Aqueduct department in the city of New York,' passed April 11, 1849," passed June 27, 1851; and an act of said legislature, entitled "An act to simplify the manner of collecting arrears of taxes, assessments and regular rents of Croton water, in the city and county of New York," passed July 20, 1853.

That said Andrew Fash entered into possession of said premises under said leases, and continued in the occupation thereof until his decease, as hereinafter stated.

Thirteenth. And this defendant, further answering, shows that said Andrew Fash, being lawfully in possession and occupation of the whole of said premises in the complaint described, under and by virtue of said several leases, and being the holder and owner of said several leases, departed this life intestate, on or about February 22, 1863, at the city of New York. That thereafter such proceedings were had, that on or about the 24th day of September, 1863, letters of administration were granted by the surrogate of the city and county of New York, on the estate, goods, chattels and credits which were of said Andrew Fash, de-

Nicol v. Fash.

ceased, to this defendant and one James W. Fowler, and they entered upon the administration of said estate.

Fourteenth. And this defendant is advised, and believes and avers, that by virtue of said letters of administration she has become vested as administratrix of said Andrew Fash, deceased, with her said co-administrator, with the leases herein above recited, being leases for terms of years, and is entitled to the possession of said premises thereunder; and she further shows that she holds and claims possession and occupation of said premises as such administratrix, with her said co-administrator, and not otherwise, under and by virtue of such leases, and that said premises have never been redeemed from the sales aforesaid, and the demised terms have not expired.

Fifteenth. And the defendant, further answering, shows that she is advised, and believes and avers, that if the plaintiff herein has any right, title or interest in the premises in question or any part thereof, such right, title and interest is subject to the right, title and interest and possession of this defendant and her said co-administrator, as administratrix and administrator, under said leases aforesaid, of said premises; and until the expiration of the terms demised in and by said leases said plaintiff has no right, title or interest, if any she ever had, in said premises."

The plaintiff demurred to these portions of the answer, and alleged as grounds of demurrer, that that part, and those parts, of said answer does not and do not, either collectively or separately, state facts sufficient to constitute on the face thereof a counter-claim or defense to the cause of action alleged in the complaint; and insisted that to constitute such a defense as is there set up, the answer must state every fact necessary to be proved, on the trial, to show a valid levy and sale and lease.

The demurrer was overruled, with costs, and the plaintiff appealed.

Nicol v. Fash.

John Townshend, for the appellant.

The defense admits the allegations of the complaint, and that but for the allegations in these paragraphs of the answer, the plaintiff would be entitled to recover.

I. The defense demurred to, amounts in effect to this: certain taxes on the property remained unpaid, the property was sold to pay such taxes, and the defendant claims under such sale, and such sale cuts off the plaintiff. To constitute such a defense, the answer must state every fact necessary to be proved on the trial, to show a valid levy and sale and lease. (*Blackwell on Tax Titles*, 501, 2d ed. *Carter v. Koezley*, 14 Abb. 147. *Stephens on Pleading*, 308.)

II. On the trial, every preliminary step to constitute a title must be shown. (*Tallman v. White*, 2 Comst. 70. *Leggett v. Rogers*, 9 Barb. 411. *Curtiss v. Follett*, 15 id. 343.) Among the preliminaries requisite at the times of the sales in question, were,

1. That assessors completed an assessment roll before August 1st, and left it with one assessor for examination by citizens.

2. That a notice of completing roll was put up at three public places.

3. Meeting of assessors to review objections.

4. That a majority of assessors subscribed the roll, and put a certificate thereto.

5. That assessors delivered roll to clerk of New York, who delivered it to supervisors.

6. That supervisors examined and corrected the roll.

7. That supervisors delivered corrected roll, with a warrant annexed, to receiver of taxes.

8. Notice by receiver of taxes, in six newspapers, to pay tax before 15th of February.

9. Personal notice by receiver, to the person from whom tax was due, to be served eight days before 1st of April.

Nicoll v. Fash.

10. Second notice by receiver of taxes, in newspapers, to pay before 1st of April.

11. That proof of service of said notices was duly filed.

12. Notice of sale, and sale.

13. Notice to redeem, to be published six months before expiration of two years after sale. (1 *R. S.* 393. *Laws of 1823, ch. 262. Laws of 1843, ch. 230.*)

III. The lease is not evidence that these acts were complied with. (*Beekman v. Bigham*, 1 *Selden*, 366. *Dike v. Lewis*, 2 *Barb.* 344. *Doughty v. Hope*, 1 *Comst.* 79; 3 *Denio*, 594.)

IV. After delivery of the lease, notice is to be served on occupant and person last assessed; the notice has to contain certain particulars, to be served in a specified manner, and the comptroller or clerk of arrears has to be satisfied that the notices were properly served, and give a certificate to that effect, before the lease becomes absolute. (*Laws of 1843, ch. 230, art. 111, p. 327, §§ 20, 21, 24. Laws of 1853, chap. 579, p. 1065, § 3. Laws of 1843, chap. 235, p. 333, § 6.*)

V. The answer is not helped by either section 161 or section 162 of the Code. (*Qarter v. Koezley*, 14 *Abb.* 147.)

VI. An answer of new matter, to be sufficient, must contain a statement of new matter constituting a defense. (*Code, § 149.*) 1. The words "must contain" are imperative. (*McKyring v. Bull*, 16 *N. Y.* 297.) 2. A defendant cannot give evidence of any new matter not contained in his answer. (*Deifendorf v. Gage*, 7 *Barb.* 18.)

VII. The answer of new matter should state every fact which the defendant must prove on the trial, to make out a defense. (*Allen v. Patterson*, 7 *N. Y.* 478. *Bailey v. Ryder*, 10 *id.* 363.)

VIII. If, on the trial, all the facts stated in this answer were conceded, they would not show a valid lease; and this seems conclusive against the sufficiency of the answer.

IX. The answer does not state directly, nor indirectly,

 Nicoll v. Fash.

that intermediate the sale and giving the lease, any notice to redeem was given. This is a vital point; without such notice, and in due form, the lease was void. (*Doughty v. Hope*, 3 Denio, 594; 1 Comst. 79. *Lawrence on Tax Laws*, p. 126.)

X. The plaintiff admits there was a sale, and admits there was no redemption, and that a lease was executed; but denies there was any notice to redeem. The defendant does not say there was any such notice, but without such notice there was no power to give a lease. The law will not assume in favor of a party, anything he has not averred. (*Oruger v. Hud. River R. R.*, 12 N. Y. 201.)

XI. The allegation in the answer, that a lease "was duly executed and delivered, under their corporate seal, by the mayor, aldermen and commonalty of the city of New York, according to law," applies only to the mode of executing the lease, which it is admitted was duly executed and delivered under the corporate seal, according to law; it cannot be construed as an allegation that every previous act had been performed, necessary to authorize the mayor &c. to give such a lease.

J. H. V. Arnold, for the respondent.

This is an action for dower in lands, brought under the provisions of the Revised Statutes. Such action must be brought against the actual occupant of the lands, if there be one; if the lands are not actually occupied, then it must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit. (2 R. S. 312, *Edm. ed.* *Child v. Chappell*, 9 N. Y. 251. *Ellicott v. Mossier*, 7 id. 201. *Redfield v. Utica and Syr. R. R. Co.*, 25 Barb. 58; S. C., 11 id. 574. *People v. Ambrecht*, 11 Abb. 100. *Putnam v. Van Buren*, 7 How. Pr. 31. *Shaver v. McGraw*, 12 Wend. 558. *Pierce v. Tuttle*, 53 Barb. 155.) Even a declaration on the part of the

Nicoll v. Fash.

defendant, that he owns the lands, if untrue, will not support the action of ejectment against him. (*Banyer v. Empie*, 5 Hill, 48.) It is not pretended by the complaint that the defendant was in actual occupation of the premises therein described. The allegation is, "that the defendant is in possession of and claims to own the aforesaid premises or some interest therein." The defendant, by the second paragraph of her answer, puts in issue the plaintiff's claim, and the defendant's possession, by the general denial. Under a general denial the defendant may show title out of the plaintiff. It is proper, however, that she should show the character and nature of the adverse possession claimed, or the facts relied on to defeat the plaintiff's claim. The defenses demurred to support the general denial of the defendant that she has any possession, or claims any interest individually in, or ownership of, the premises, and shows that the only interest in, or possession of, the premises she holds or claims is as administratrix of Andrew Fash, deceased, and that the suit is brought improperly against her individually, and should have been brought against her as such administratrix jointly with her co-administrator, as pleaded by the sixteenth paragraph of the answer (which is not demurred to.) The defendant cannot be brought into court and subjected to a claim for costs and damages where she has no individual interest or possession. Her interest is a joint one with her co-administrator, and is indivisible. Where there are two or more administrators or executors who have qualified, all must be made parties. (*Code* § 119. *Serantom v. Farmers' &c. Bk.*, 33 Barb. 531. *Moore v. Willett*, 2 Hilton, 522.) It is the right of a party who is sued to require that any other person jointly liable with him shall be made defendant. (*Van Name v. Van Name*, 23 How. Pr. 252. *Wooster v. Chamberlin*, 28 Barb. 602.) There is a defect of parties defendant, and such defect not appearing upon the face of the complaint, must be pleaded

by the defendant in the answer, in order to avail himself of the same at the trial; and he must point out in the answer all those whom he claims should be made parties defendant with him. (*Code*, § 144. *Fowler v. Kennedy*, 2 *Abb.* 351. *Wigand v. Sichel*, 3 *Keyes*, 120.) If he omits to set the plaintiff right when he has an opportunity to do so, he cannot afterwards take advantage of it. (*Edwards v. Farmers' Ins. and L. Co.*, 21 *Wend.* 467.) The paragraphs of the answer demurred to, show the character of the defendant's interest and claim in the premises. They are really all, in connection with the sixteenth paragraph of the answer, which is not demurred to, one entire defense, i. e., that the suit is improperly brought against the defendant, and the facts supporting such defense. A demurrer will not lie to part of an entire defense in an answer. (*Cobb v. Frazee*, 4 *How. Pr.* 413. *Welch v. Hazelton*, 14 *id.* 97.) At the worst, the matter demurred to might be redundant or irrelevant. In such case the plaintiff's remedy would be by motion to strike out, and not by demurrer. (*Code*, § 160. *Watson v. Husson*, 1 *Duer*, 242. *Spies v. Transit Co.*, 5 *id.* 662. *Roeder v. Ormsby*, 13 *Abb.* 334. *Seeley v. Engel*, 13 *N. Y.* 542. *Smith v. Greenin*, 2 *Sand.* 702. *Ward v. Ward*, 5 *Abb. N. S.* 145.) But it is submitted that there is nothing in the matter demurred to which is not proper and pertinent in support of the allegations of non-joinder, and denial of possession, as well as tending to show title out of the plaintiff. The answer, in setting up the outstanding title under tax sales, shows a title paramount to any claim which the plaintiff can have, at least during the pendency of the term for which the conveyance of the premises was given to Fash, which is all that is claimed in the answer. The answer states particularly when, by whom, for what cause, and under what statutes, the taxes under which the sale was had, were imposed; the amount of the tax; that it remained unpaid; and all the facts essen-

Nicoll v. Fash.

tial to create the authority to sell; and is not open to any of the objections which were urged in the case of *Carter v. Koezley*, (14 Abb. Pr. 149.) It must also be borne in mind that in that case the defendant admitted his possession of the premises, but set up title under the tax sale in himself. The allegations with reference to services of notices, fully refer to the sections of the statutes under which they were given. Such notices were not necessary to be given in all cases, only in those in which mortgagees and others had filed memorandums of their claims, or where the last owner to whom the premises were assessed was a resident of the city and county of New York. (See *Laws of N. Y. of 1843, ch. 235, p. 335*; *Id.* 1841, *ch. 230, p. 141*; *Id. ch. 170, p. 210.*) It may appear upon the trial that the giving of such notices was unnecessary in this matter. If the premises were last assessed to Edward A. Nicoll, the plaintiff's husband, this would be so, as he is stated in the complaint to have died several years before the leases were given. The leases are conclusive evidence that the sales in pursuance of which they were given were regular, according to the provisions of the statute, and being given they stand absolute. (*Laws of 1850, ch. 183. Id. 1855, ch. 427, § 65. Id. 1843, ch. 230, p. 223.*)

By the Court, CARDOZO, J. It was not disputed on the argument, and cannot be, but that the answer does not aver several matters which it will be necessary for the defendant to prove, to establish the validity of the lease. If the truth of the plea, therefore, were conceded, the defendant would not be entitled to judgment, because other facts must be proven, to establish her case; and not having pleaded those facts, she cannot claim to give evidence to support them. It is plain, from this statement, that that part of the answer demurred to is bad.

The defendant's counsel now insists that that part of

Smith v. Kobbe.

the answer is irrelevant, or rather that it is introductory to the sixteenth clause, and that a demurrer will not lie to a part of a defense. But the difficulty is that it is not pleaded as part of one defense. The defendant has stated them separately and numbered them, thus clearly showing, by his compliance with the 25th rule of the court, that he meant to plead them as separate and distinct defenses. He cannot now be heard to assert that they are not so.

The statute of 1855, (*Laws of 1855, ch. 427,*) does not aid the defendant. It relates only to conveyances made by the comptroller of the State.

The judgment below should be reversed, and judgment rendered for the plaintiff on the demurrer, with leave to the defendant to amend her answer.

Judgment reversed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham, P. J.* and *Cardozo* and *Geo. G. Barnard* Justices.]

SMITH vs. KOBBE and others.

It is erroneous for a referee to receive and act upon the testimony of a non-professional witness as to the value of the plaintiff's services as a lawyer, after he has stated that he knows nothing of their value.

A referee should pass upon objections to evidence, as they arise. It is error for him to reserve his rulings upon the questions arising, and objections made, until the final submission of the case, and then decide the case as though there had been no objections to any portion of the evidence.

APPEAL by the defendants from a judgment entered upon the report of a referee. The action was brought by the plaintiff to recover for professional services as an attorney and counsellor. The referee allowed the whole amount of the plaintiff's claim.

Smith v. Kobbe.

D. McMahon, for the appellants.

DuBois Smith, respondent, in person.

By the Court, GEO. G. BARNARD, J. The referee erred in permitting Mr. Gerding to testify as to the value of the plaintiff's claim and services as a lawyer. He stated that he knew nothing of their value, and yet the referee received his testimony, and acted upon it in making up his report.

The referee not only erred in the admission and rejection of much of the testimony, but refused to pass upon many other questions and answers. He seems to have reserved his rulings upon nearly all of the questions and objections until the final submission of the case, and then decided the case as though there had been no objections to any portion of the evidence.

I think the decision is wrong, and should be reversed, costs to abide the event of the action, and the present order of reference to be vacated.

Order to be settled by Judge BARNARD.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham P. J.*, and *Geo. G. Barnard*, Justice.]

JOSEPH W. SAVAGE vs. JOSEPHINE ALLEN.

It is improper to commence one action to stay proceedings in another, whether in the same court or in another court, when the plaintiff in the second action could have obtained the same relief in the original action that he may obtain in the second.

If the former action is still pending, the defendant therein is not remediless.

He may yet set up, therein, any defense which he has against the claim of the plaintiff.

THIS is an appeal from a judgment rendered for the plaintiff, in an action brought by him against the defendant, to restrain an action of ejectment, brought by the defendant, in the superior court of New York, against the plaintiff, and to compel the defendant to execute and deliver to the plaintiff a deed confirming the title of the plaintiff to the premises in dispute, under the defendant's former conveyance thereof to the plaintiff's grantor, Mary Child.

The action was referred to a referee to hear and determine, who found and reported, as matters of fact:

That in the year 1847, the defendant, Josephine Allen, was in the possession of the lot of land designated in the complaint as No. 32, on a certain map, by descent from her mother, one of the children of Francis Child; that the mother of the defendant, under the will of the said Francis Child, was entitled to one third of the real estate in fee, and that, on the partition of the said estate, in the year 1845, said lot No. 32 was set apart to her. That on the death of said defendant's mother, and in the year 1847, application was made to the court, in behalf of the said defendant, then an infant, for the sale of said lot No. 32, and that during the same year, in pursuance of an order of the court, the said defendant, by her guardian Lucas Parsons, duly appointed, sold and conveyed the said lot No. 32 to the plaintiff's grantor, Mary Child, for an adequate consideration, and that said sale was duly confirmed by the court on the 29th of October, 1847. That

Savage v. Allen.

upon proceedings afterwards had, the aforesaid partition made in 1845, was set aside, and in February, 1851, a new partition was made, on which last mentioned partition the lot, No. 32, was again set off to the share or part of the said defendant. That pending the aforesaid proceedings, and in March, 1848, the said Mary Child conveyed said lot No. 32 to the plaintiff, for an adequate consideration. That after the partition in 1851, and during that year, the said defendant brought her ejectment suit, [in the superior court of New York,] to recover from the plaintiff the said lot No. 32. That the plaintiff's omission to set up his claim to said lot No. 32, in the aforesaid second partition, and as a defense to the defendant's said ejectment suit, was, if erroneous, an error of judgment, and in so doing he acted on the advice of counsel, and did not, by so doing, mislead any new, ignorant or innocent party. That all the parties to the aforesaid deed of the infant, by her guardian, acted upon the faith that the fee of the said lot No. 32 was in the hands of the then infant, now adult, defendant, Josephine Allen, and that her grantee therein, Mary Child, and the plaintiff, parted with their money in this faith. Upon the above facts, and the facts set forth in the pleadings, and admitted by the parties, and upon the testimony, oral and documentary, produced on the trial, the referee found in and by his said report, as his conclusions of law: That the complaint was sufficiently proved to entitle the plaintiff to the remedy prayed for in his complaint, and that the defendant, Josephine Allen, should be ordered to execute a confirmatory deed of said lot No. 32, to the plaintiff, and be enjoined from any proceedings in her said ejectment suit. That the equities were in favor of the plaintiff's claim. That the omission of the plaintiff to set up his claim to lot No. 32, in the second partition proceeding, did not preclude his legal or equitable remedy in this action. That this action was maintainable, and the proper and adequate remedy could be adjudged to the

Savage v. Allen.

plaintiff herein. That upon the whole merits of the plaintiff's case, he was not estopped from asserting his legal or equitable claim against the defendant. That the recitals contained in the defendant's said deed were binding upon her, and she was estopped by them, notwithstanding her infancy. That the said deed was sufficient to convey the fee of the said lot No. 32, as far as the defendant owned or claimed the same. That the said conveyance was in effect the same as if made by the defendant when of full age, and validated the contents of the deed as if made by an adult. That the equity of the case was on the plaintiff's side, for the confirmation of the title to said lot No. 32, and the defendant should be compelled to execute a confirmatory conveyance of the said lot No. 32 to the plaintiff.

And the referee ordered judgment accordingly; from which judgment the defendant appealed.

Wm. Henry Arnoux, for the appellant.

W. Howard Wait, for the respondent.

By the Court, INGRAHAM, P. J. The motion to dismiss the complaint should have been granted.

The complaint alleges that Henry L. Parsons, as guardian of the defendant in this action, had commenced an action in the superior court against this plaintiff and his tenant, to recover possession of the lot referred to in the pleadings, in this action, and that the said action is still pending. It also appeared on the trial that in such action, as in this, the defendant having become of full age, had rendered the appearance of a guardian unnecessary, and the actions are continued as to her alone. Under the decisions of the general term, it is improper to commence one action to stay proceedings in another, whether in the same court or in another court, when the plaintiff in the

Savage v. Allen.

second action could have obtained the same relief in the original action, that he might have obtained in the present action. That such was the case in the action in the superior court, there can be no doubt. The defendant here, by her guardian, brought an action against the plaintiff here and his tenant, to recover from them the possession of the lot in controversy. The defendant in that suit could have set up in his answer, all the matters alleged in his complaint in this action, and could have asked for all the relief that he asks for. Those facts, if true, would have been a good defense to the plaintiff's claim there, and would have entitled him to a judgment for all that he claims here, unless the plaintiff there could have shown such claim to be invalid. The referee was of the opinion, rightly, that such relief could have been granted in that action. Under such circumstances this action cannot be maintained. (*Schell v. The Erie Railway Co.*, 51 Barb. 368. *The Erie Railway Co. v. Ramsey*, 57 id. 449. *Stover v. Cogswell*, Id. 448.) It is said in the latter case the plaintiff can yet move, in that action, for such relief as the facts show he ought to have, against the judgment which has passed against him. In this case the action in the superior court is still pending, and the plaintiff can set up therein, any defense which he now has against the claim of this defendant.

The judgment should be reversed, and judgment of dismissal of complaint ordered.

Judgment reversed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingram*, P. J. and *Cardozo* and *Geo. G. Barnard*, Justices.]

CATHARINE A. SCHUCHARDT *vs.* THE MAYOR &C. OF THE
CITY OF NEW YORK.

Where commissioners appointed under the act of 1818, (1 *E. L.* 418, § 178,) to estimate the damages sustained by land owners by reason of the extension of a street in the city of New York, report that a portion of a lot will be required, for the improvement, and award to the owner a specified sum, in consideration of his relinquishing the said piece of land, with the improvements thereon, for the purpose of such extension, and of his removing the building from the lot; allowing the owner to retain the materials of which the building consists, as part compensation for the damage sustained by him; and such report is confirmed, on the application of the city corporation; the confirmation of the report is binding and conclusive upon the corporation, as well in respect to the materials, as in respect to the other portions. *Per* INGRAHAM, P. J.

If the awarding of the materials to the owner of the lot is objectionable to the city corporation, they should make the objection before the confirmation of the report. They cannot do so after it has been confirmed. And if they convert such materials to their own use, they are liable to the owner. *Per* INGRAHAM, P. J.

APPEAL from an order made at a special term sustaining a demurrer to the complaint, and from a judgment entered thereon. The demurrer was upon the ground that the complaint did not state a cause of action.

The action was commenced by the service of a summons for relief, and the complaint was framed with a double aspect to both equitable and legal relief. The complaint states, in substance, that at the time of the Church street extension in 1867, the appellant owned a certain lot, known as lot No. 7 on the Church street extension map, together with a building on a portion of it, composed of brick, stone, iron and timber, about thirty feet in width by fifty-two feet in depth, and five stories high, the materials of which building, if removed from the lot and sold, were valued at about \$10,000. That the commissioners for the estimate of damages in the Church street extension matter, reported to the Supreme Court that the "lot, piece or parcel of land" in question, belonging to the appellant, would be required for the Church street extension. They

Schuchardt v. The Mayor &c. of New York.

did not report that the building would be required. They also reported that the damage of the appellant, in consequence of her relinquishing the said lot, with the improvements thereon, for the purpose of said extension, and of her removing the building from the lot, which by the terms of the report they required her to remove, amounted to \$29,040, and to this report, thus understood, the appellant consented. The complaint then avers, as a distinct, provable fact, independent of the report itself, that the commissioners who made it, and the court that confirmed it, both intended and meant by the report, and by its confirmation, to exclude from their estimate of the appellant's damages by reason of the taking of her lot, the value of the *old materials* of the *building then standing* on it, and both intended and meant that she should retain her title to the materials of said buildings, and should remove them from the lot at her own expense and for her own benefit. That as the commissioners did not need the building for the extension, they did not take it, nor pay for it, so far as it was valuable as old building material; but merely paid the owner for the lot and the building as a building, less the value of the building as old material; and for the expense of removing the materials of the building from the lot. The complaint further states, that if the report conveys any idea in reference to the ownership of the materials of the building, different from that above expressed, it is through mistake only. The complaint further states, that except in the case of special legislation, the view above expressed is in accordance with the uniform practice in respect to buildings standing on lots taken in the case of street openings in New York city heretofore, when the reports have been similar in phraseology to the phraseology of the one in question. It further states, that before the report was presented to the court for confirmation, the commissioners stated to the property owners interested, that the report gave them the

Schuchardt v. The Mayor &c. of New York.

right to the materials of the buildings, and the right to remove them from the lots taken, and thereby prevented them from making any objections to its confirmation by the court, and secured their acquiescence in it. The complaint then states that the appellant has always been ready to remove the materials of the building from the lot in question, but that the respondents, instead of allowing her so to do, on the 17th of April, 1869, converted those materials to *their own use*. Her damage thereby is estimated at the sum of \$10,000, and she asks judgment for that sum, and for any further or other relief that may be appropriate to the case stated.

The respondent demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action; and on the argument of the demurrer before Justice CARDOZO, the ground of the demurrer assigned by counsel was, that inasmuch as by section 178 of the act of April 9, 1813, (*see Davies' laws relative to the city*, p. 534,) the report, when confirmed, is declared to be final and conclusive on both appellant and respondents; and inasmuch as that section further declares that on the final confirmation of the report by the court, the corporation (the respondents) became seised in fee of all the lands, tenements, hereditaments and premises in the report mentioned, that should be required for the purpose of extending the street in question; that therefore, by force of the law itself, and the confirmation of the report under the law, (the report having declared that the lot would be required for the extension,) the title to the building in question, as well as that to the lot, was conclusively and indisputably vested in the respondents.

The justice below sustained the demurrer, and held that the commissioners had power only to make an award, and that any provision contained in the latter part of the report, though intended as part of the award, was nevertheless *null and void*.

Schuchardt v. The Mayor &c. of New York.

J. Hooker Hamersley, for the appellant.

I. Under the law of eminent domain, the State can only take what it is indispensably necessary to take for a public use. Here it was not necessary to take the materials of the building in order to extend the street, and if the commissioners had undertaken to take them, (which they did not do,) their act would have been void; and any law which might have authorized them to take them would also be void, the materials of the building being clearly not required for public use. The fact is admitted by the demurrer, that the corporation converted them to *their own use*. The respondents in fact sold the materials and put the proceeds into their own treasury. (*Const. State of N. Y. art. I, §§ 6, 7. Embury v. Conner, 3 Comst. 511.*)

II. The court below held that the lot in question was mentioned in the report as being required for the purpose of the extension, and that the building being on the lot, the law vested the title to the building in the respondents, even if the report mentioned the materials of the building as not being required, and as not being taken for the purpose of the extension. That the commissioners could not take and pay for the lot and, at the same time, leave the materials of the building on the lot, untaken and unpaid for; and that if they had undertaken to do so, the consequence would be, as in this case, that the corporation would be entitled to the materials without paying for them, unless objection was made by the owner of them, when the report was presented to the court for confirmation. This construction of the law is a harsh and novel one, contrary to the principle stated in point 1st, and contrary to a well established custom which has been acted upon in New York for over sixty years; in direct contemplation of which the report in question was prepared, and by which the city has required the owner to remove his building, and has allowed him the materials thus removed. This construction seems obviously as strained and un-

Schuchardt v. The Mayor &c. of New York.

practical, as it is novel and unjust, by reference to the language of the act itself. The language of the act is not that the city, on the confirmation of the report, became seised in fee of all the lands, tenements, hereditaments and premises, in the report mentioned, but of all such as shall be so mentioned as being required to be taken for the extension; and this would be the construction to be put upon the law, even without these words, for of course the law itself, and the report, relate only to what is essential to the extension. If the construction of the court below can be maintained, then a portion of the appellant's property can, and has been, legally taken, not only "without just compensation," (*Const. art. I, § 6*.) but without any compensation whatever, simply because it was mentioned in a report which did not undertake to appropriate it to public use, and in a case in which it was not required for public use, and against which report there was, consequently, no reason on the part of the owner of the materials to object, when it was presented for confirmation to the court.

III. If the point taken by the justice below is overruled, then we submit that the plain intention and effect of the report of the commissioners of estimate and assessment in the opening of Church street, is to leave the appellant the ownership of the materials of the building in question, and the right of removing the same from the lot; and the respondents are, therefore, bound to pay her for the same, it being admitted by the demurrer that they have converted them, not to a public use, but to their own use. By the report in question, the materials of the building still belong to Mrs. Schuchardt. The commissioners intended to leave the materials to her, and they had authority to do so, especially as she acquiesced in that mode of adjusting her damages. 1. The intention of the commissioners is unmistakable on this point. (a.) It appears from the language of the report itself, which makes her an award for

Schuchardt v. The Mayor &c. of New York.

relinquishing the land and the improvements thereon, and for removing the materials. If she is to remove them it is manifestly for her own benefit. This position is not affected by the fact that she is to relinquish not only the land but the improvements; for although she remains entitled to the building until removed, the very removal destroys it as an "improvement;" and fully answers to the language of the report in that particular. (b.) The intention is still more plain when we consider the custom in view of which the commissioners acted. They regulated the award to the appellant on the basis of her retaining the materials of the building, for whatever they might be worth. This fact can be clearly established if the testimony of the commissioners who made the report is taken.

2. Such being the intention of the commissioners, they had sufficient authority to carry out the intention, especially with consent of the owner of the building. (a.) Their action in this respect has been fully ratified by the confirmation of the report, which thereupon becomes final and conclusive. (*See act of April 9, 1813, ch. 86, § 178.*) As we look at the legislative debates to determine the animus of a law, *a fortiori*, we can learn from the author of a report what his language means, and what was the contract with the parties damaged. This argument gains greater force when we consider that this whole proceeding is one instituted by the city to obtain a compulsory transfer of property to them. When, therefore, they have come to a distinct agreement, (acting by the commission as their representative,) they would seem to be doubly estopped from breaking that agreement in matters beneficial to the owner. (b.) The act of 1813 itself, by its express language, authorizes such a separation between the land and buildings on the question of ownership, and fully sanctions the action of the commissioners in this case, in taking the former for the city, and leaving the latter for Mrs. Schuchardt. Section 177 contemplates the "removal of build-

Schuchardt v. The Mayor &c. of New York.

ings" as quite a different thing from the "taking of lands and tenements." The corporation is, therefore, not confined to the "taking" of buildings, but, when it will answer the purpose as well, may cause them to be removed by the owner, which necessarily implies a refusal to take. Sections 178 directs them to estimate the damage to owners of such "lands, tenements, hereditaments, and premises," as are required for the purpose of the street, and upon the confirmation of the report the corporation becomes seised in fee only of such "lands, tenements, hereditaments, and premises," mentioned in said report, as are required to be taken, for the proposed purpose. It follows, therefore, that the act contemplates just such a separation of ownership between the land and the building, as is sought to be carried out in this case. (c.) The act, by necessary implication, from the duties imposed upon the commissioners, authorizes them to relinquish the building to the owner, for the purpose of thus diminishing her award for damages. They are directed first to ascertain what is required to be taken, and their report, leaving the buildings to the former owners, is authorized as a declaration that they are not so required. Again; in estimating the damages done to the owners of lands, tenements, &c., they are not only authorized, but are bound to take into view, themselves, and to compel the owner to take into view all reasonable means within the latter's reach, by which that damage can be diminished. If, therefore, with her consent, they can leave her the building, either to remove to another place, or to dispose of as old materials, they are bound to do so in diminution of her award. They are not at liberty to estimate as damage the total value of buildings through which the street is to run, but must modify the estimate according to ordinary methods of diminishing it; i. e., where the side wall of a building is carried away, the true estimate would be the cost of building a new wall, and the decreased value of the building

Schuchardt v. The Mayor &c. of New York.

when repaired. So, if land be taken on which is an ornamental statue, which, though built into the soil, can be removed, they must require the owner to remove it, and not award him its value. So of a building which can be readily removed, uninjured, upon adjoining land of the same owner. So of valuable fixtures in a jeweler's store, bank, or the like. These examples, and the practice under the law, show that the directions to estimate only the loss and damage occasioned to the owner, contains an implied authority to leave upon the owner, in exoneration of the improvement, whatever may thus be left without interfering with the measure. It would seem, therefore, that the intention and effect of the report was, as stated in this point, to leave to Mrs. Schuchardt the undisputed ownership of the materials of the building, and the right to remove the same.

IV. The title to be acquired under these proceedings being, by force of the statute, transferred only for the purpose of a specified trust, i. e., to open and lay out a public street, &c., the act should be so construed as to give effect to the transfer, only to the precise extent required for the purpose of the trust, and as the materials were not required, no title to them was ever vested in the city. 1. The act of April 9, 1813, (*Davies' Laws*, p. 534,) declared, in effect, that on the final confirmation of the report of the commissioners, the corporation of New York shall become seised in fee of all the lands and premises that may be so required for the purpose of extending, &c., the street, the same to be appropriated and used for such purpose, accordingly, and thereupon the corporation may immediately, or at any time thereafter, take possession of the same, without any suit at law, in trust, nevertheless, that the same be kept open as a public street, provided that the corporation may permit any building on the line of a street, on the commissioners' map, to remain unremoved so long as it may think proper. (*See act of April 9, 1813; Davies' Laws*,

 Schuchardt v. The Mayor &c. of New York.

p. 534.) In *Fletcher on Estates of Trustees*, we read, page 48, that "the very reasonable rule is generally to be observed, that every trustee must be presumed to take an estate as large as is necessary for the purpose of his trust, and no larger." In the words of Lord Ellenborough, "trustees must, in all cases, be presumed to take an estate commensurate with the charges or duties imposed upon them." (*Trent v. Hanning*, 7 *East*, 97.) "Trustees must not, in general, be construed to take a greater estate than the nature of the trust demands, since that would be unnecessarily to disinherit the heir, and, in some cases, to defeat the testator's intention, by preventing other limitations in his will from taking effect." (*Fletch. on Trustees*, 49. 5 *Taunt.* 383.) In the words of Lord Ellenborough, "When the purpose of a trust can be answered by a less estate than a fee simple, a greater estate than is sufficient shall not pass to them," i. e., to the trustees. (*Doe v. Simpson*, 5 *East*, 172. *Goodlittle v. Whitby*, 1 *Bun.* 229.) There is the same reason for interpreting a statute, so as to conform it to the object which the legislature had in view, as to construe a will in that way, or according to the intention of the testator. There is the same motive not to deprive the owner of his estate without compensation, as there is not to disinherit the heir. And especially when a contrary interpretation would be against the letter or spirit of the constitution. (*Lewin on Trusts, &c.*, 234.) The court is necessarily led to enter upon the consideration of the trust, in order to measure the extent of the legal interest by the scope and object of the equitable. The following rules of construction have, in consequence, been adopted: 1st. Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied. 2d. The legal estate, limited to the trustee, shall not be carried farther than the complete execution of the trust necessarily implies. Thus, it is evident that the commissioners had no right or power to do

Schuchardt v. The Mayor &c. of New York.

that which the judgment in the court below takes it for granted that they have done, notwithstanding the fact that the commissioners themselves had no intention of so doing.

V. But if the court consider the report as in itself dubiously or obscurely expressed, and that it is a case where they could be aided in its construction by extrinsic evidence of custom, and of the sense given to the words used in the report by usage, and by the commissioners themselves; then our complaint is framed with a view to the taking of such evidence, which would fully show that invariable usage has long given to the words of the report the special meaning which we attach to them.

VI. We have also framed our complaint upon the theory that, through mistake, the report does not express the intention of the commissioners; and upon that ground to have it revised, so as to make it express their intention; inasmuch as we charge in the complaint, we were prevented from objecting to the report when presented to the court, and lost our opportunity of objecting by reason of the express declaration of the commission that the report was framed so as to leave to the property owners the title to the materials of the buildings.

Richard O'Gorman, for the respondents.

I. On the confirmation of the report of the commissioners, on the 30th day of December, 1867, the title to the lands required for the opening of Church street, with the tenements, hereditaments, and premises, was vested in the mayor, aldermen and commonalty of the city of New York.

By the 178th section of the act entitled "An act to reduce several laws, relating particularly to the city of New York, into one act," passed April 9, 1813, the duty of the commissioners was clearly and plainly defined. They were to make just and equitable assessment of the loss and damage * * and report * * "as and for the com-

 Schuchardt v. The Mayor &c. of New York.

pension and recompense, and the same shall be the compensation and recompense to be made to such owner or owners, lessee or lessees, parties and persons respectively for his, her, or their loss and damage, by and in consequence of the said operation and improvement of opening, laying out, and forming or extending, enlarging or otherwise improving such said public square, place, avenue, street, or part or section of a street or avenue to be opened, laid out and formed, or extended, enlarged or otherwise improved, as the case may be, and relinquishing the said lands, tenements, hereditaments and premises so required of him, her or them, for that purpose." * * (2 *Hoff. Laws*, p. 804. *Act of 1813*, § 178.) Other provisions of like import are contained in this section, which it is deemed unnecessary to set forth in *hæc verbo*, and are followed by the provision: "And said report, when so confirmed by the said court, shall be final and conclusive, as well upon the said mayor, aldermen and commonalty of the city of New York, as upon the owners, lessees, persons and parties interested in, and entitled to, the lands, tenements, hereditaments and premises mentioned in said report, and also upon all other persons whomsoever; and on such final confirmation of such report by the said court, the said mayor, aldermen and commonalty of the city of New York shall become and be seised in fee of all the said lands, tenements, hereditaments, and premises in the said report mentioned, that shall or may be so required for the purpose of opening the said public square, place, street or avenue, or park or section of a street or avenue so to be opened, * * * the same to be appropriated, converted and used, to and for such purposes accordingly. Thereupon the said mayor, aldermen and commonalty, or any person or persons acting under their authority, may immediately, or at any time or times thereafter, take possession of the same or any part or parts thereof, without any suit or proceeding at law for that purpose, in trust,

Schuchardt v. The Mayor &c. of New York.

nevertheless, that the same be appropriated and kept open for or as part of a public street, avenue, square or place, forever," &c.

In the continuation of this section special provision is made relative to buildings on lands taken for street purposes in that portion of the city which was laid out under the act of April 3, 1807.

II. It will be seen by the statute that the commissioners had no authority to make any reference to the removal of buildings from the premises. It was their duty to estimate the loss and damage and compensate the owners for the land and improvements, and the statute declared that the fee of the land and improvements vested in the mayor, aldermen and commonalty.

The note to the report, that all buildings would be required to be removed, was of no effect. The commissioners had no power to make such a suggestion, and if the owners felt that they had not been awarded sufficient to cover the land and buildings, it was a proper and competent objection for them to make on the application for confirmation of the awards, and the corporation could not have answered, in law, that it did not take the buildings.

INGRAHAM, P. J. It cannot be necessary for the decision of this case, to inquire whether the defendants might not have been authorized to take possession of and sell any buildings standing on the portion of the street which is opened, if the commissioners award the value of such building to the owner. If it were necessary, I should have no hesitation in holding that such an award would vest the title to the property in the defendants.

In the present case, the averment is that the commissioners only awarded damages for injury to the building, and for removing it, and that the materials were awarded to the plaintiff as part compensation for the damages sustained by her. The act of 1813, (2 *R. L.* 413,) provides that the

Schuchardt v. The Mayor &c. of New York.

report, when confirmed by the court, shall be final and conclusive as well upon the mayor, aldermen and commonalty of the city of New York, as upon the owners, lessees and persons interested in the lands &c. and upon all other persons whatsoever.

The report is confirmed on the application of the defendants, and its confirmation is made conclusive upon them. I am at a loss to see upon what ground they can now say that the report is not binding as to the materials, as much as it is as to the other portions. If the awarding of the materials was objectionable to the defendants, they should have made such objections before the confirmation of the report. They cannot do so after the report has been confirmed.

It seems to me that the complaint does state a sufficient cause of action, and that the demurrer is not well taken. The judgment should be reversed, and judgment ordered for the plaintiff, on the demurrer, with leave to the defendants to answer on payment of costs.

GEO. G. BARNARD, J., dissented.

The judges before whom this case was heard having disagreed, the same was sent to the second department for hearing. (*See act of April 27, 1870, relating to the Supreme Court, § 6.*)

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 3, 1871. *Ingraham*, P. J., and *Geo. G. Barnard*, Justice.]

ORLANDO W. JOSLYN *et al.* vs. JAMES FISK, JR. *et al.*

It was not the intent of the legislature, by the 2d subdivision of section 88 of the Code, to authorize the Supreme Court to remove into that court actions pending in the superior court or court of common pleas for the city and county of New York, except upon an application showing the propriety of *changing the place of trial* from the city of New York. *Per* INGRAHAM, P. J. The mere fact that sixteen actions between the parties are pending in the superior court and court of common pleas, and five are pending in the Supreme Court, will not authorize the removal of the actions pending in the former courts to the Supreme Court. *Per* INGRAHAM, P. J.

IN this action, and four others pending in the New York common pleas, and eleven pending in the superior court, motions were made to have the same removed into the Supreme Court. Five actions of the same character, against the same defendants, had been commenced in this court. The reasons stated in the affidavit on which the motion was made for the removal of the causes were, that the defendants had a good defense; that the amount of damages claimed was large; that the actions were similar in character; that the transactions took place under similar circumstances, and the grounds of defense are substantially the same; that the several actions involve difficult questions of law, and the trial will be prolonged; that five similar actions had been brought in the Supreme Court, in which one or more of the questions of law involved had been submitted to the court, but not decided, and stating also the questions of law so raised. Upon these facts the court granted the motion removing all the causes into this court. The plaintiffs in the actions pending in the common pleas appealed to this court.

Joseph R. Flanders and *James Betts Metcalf*, for the appellants.

David Dudley Field, for the respondents.

Joslyn v. Fisk.

INGRAHAM, P. J. The provision of the Code under which this motion is made is contained in the 33d section, and is as follows, viz.: "The Supreme Court may remove into that court any action brought under this subdivision and pending in the superior court or court of common pleas for the city and county of New York, and may change the place of trial therein, as if such action had been commenced in the Supreme Court." The objection taken to the granting of this motion was that this court had no power to remove a cause from either of these courts under this section, unless it appears that the motion is made for the purpose of changing the place of trial to some other county than that of New York. On first reading this section, it may be supposed that the power of removal was intended to be general, and might be exercised irrespective of the question of change of the place of trial; but upon a more careful examination of the provisions of the statutes on this subject, I am led to a different conclusion. Prior to the adoption of the Code, the jurisdiction of the New York common pleas extended to all local actions arising within the county of New York, and all transitory actions, although the same may not have arisen within such county, (2 *R. S. marg. p.* 208, § 1,) subject to removal by the Supreme Court when the debt or damages claimed exceeded the sum of \$500. (2 *R. S. marg. p.* 389, § 1.) By an act passed in 1830, authority was given to the Supreme Court to remove from the common pleas any transitory action pending in that court, in which the trial should be had elsewhere than in the county of New York. (*Sess. Laws* 1830, *ch.* 186, *p.* 208.) The effect of these laws was to give to the Supreme Court power to remove any action in which the damages exceeded \$500, and any transitory action where the place of trial should be changed. This removal, at that time, was prohibited in actions pending in the superior court before final judgment, excepting in cases in which a transitory action pending in that court

Joslyn v. Fisk.

ought to be tried in another county; and in such cases the Supreme Court had authority to make an order to remove the cause in the same manner as if the action was pending in the Supreme Court. (*Act establishing superior court, Sess. Laws of 1828, ch. 137, p. 141.*) By an act passed in 1844, (*Sess. Laws of 1844, ch. 32, p. 30.*) the provisions of the last cited statute as contained in section 15, were extended, and made applicable to the court of common pleas. After the passage of this act, no cause could be removed from either court, except for the purpose of changing the place of trial. This continued to be the law as to these courts, until the adoption of the Code of Procedure in 1848. In the Code, as originally adopted, the jurisdiction of these courts was continued as it then existed, with some additional powers, but no alteration of the law as to the removal of causes was inserted therein. (*Code of 1848, Sess. Laws p. 504.*) In 1849 the Code was amended, and the section as it now stands was adopted. In 1854 an act relating to the court of common pleas was passed, defining the jurisdiction of that court to be, among other powers, to exercise in the city and county of New York all the powers and jurisdiction now or hereafter conferred upon or vested in the said court, or the county courts in their counties, and the powers and jurisdiction which were vested in the court of common pleas for the city and county of New York before the enactment of the act designated as the Code of Procedure, passed April 12, 1848. (*Sess. Laws of 1854, ch. 198, p. 464.*) Whatever construction might therefore be given to the amended section of the Code as passed in 1849, as limiting the jurisdiction of the common pleas, such amendment would cease to affect the jurisdiction of the common pleas after the passage of the act of 1854, which restored the jurisdiction of that court as it existed prior to the adoption of the Code. At that time, as I have before remarked, the jurisdiction of the court extended to all local actions arising within the

Joslyn v. Fisk.

county, and to all transitory actions, although the same may not have arisen within the county, subject to a power vested in the Supreme Court to remove any transitory action in which the trial should be had elsewhere than in the county of New York. It seems to me, therefore, that in regard to the New York common pleas, whatever construction may be put upon the provisions of the Code as to the superior court, the only power which this court can exercise in removing causes from that court, is in actions where it is proper to change the place of trial from the city and county of New York to some other county in the State. These views would dispose of the question, so far as relates to the common pleas, and I might leave the examination of the question here; but I am inclined to adopt the same opinion on an examination of the section on which the defendant relies in making the application. No authority is given to remove such causes, except under that which unites the removal with the change of the place of trial. The application is not confined to the court in any district, but may be made to the Supreme Court, and in any district; and if made to the court in any district, the court may order the action to be tried in the district where the motion is made, unless the object of the motion is confined to the place of trial. There is no necessity of authority to change the place of trial, if the court has power to remove the cause generally; because after it has been removed, the place of trial may be changed, the same as in other actions. The section also directs that the order for removal and change of place of trial is to be made in the Supreme Court, on motion, and is to take effect only on filing a certified copy of such order in the office of the clerk of the court. Such clerk is required to transfer the papers in the cause to the clerk of the county in which, by such order, the trial is ordered to be had. Unless such place of trial is designated in the order of removal, there would be no

Joslyn v. Flak.

authority for the clerk to transfer the papers to any county clerk.

The portion of the order appealed from which directs the papers to be given to the clerk of the city and county of New York, would not be a compliance with the statute, because there is no direction in the order where the trial is to be had, and if such papers were filed in any other county than that in which the trial was ordered, it would not be according to the intent of the act. The fact, also, that this provision is confined to transitory actions, and that no authority exists for the removal of local actions, affords a strong presumption that the intent of the legislature was to confine this power to cases in which it was necessary to change the place of trial.

From the suggestions above made, I have come to the conclusion that it was not the intent of the legislature to authorize the removal of such causes except upon an application showing the propriety of changing the place of trial from the city of New York. In looking at the grounds on which the removal is asked for, there is but one which could not be made applicable to any cases in which one action is brought in this court, and one in either of the other courts for similar causes of action; and that is that the decision of this court would not be binding on the other courts, nor would it be followed by them unless that court concurred in its correctness. It must, however, be remembered that those courts are, as to their decisions, of coördinate authority with this court; that appeals are to be made directly from those courts to the Court of Appeals, in the same manner as in this court. While suitors are allowed to select the court in which they will bring their actions, that privilege should not be interfered with, except in cases clearly authorized by law, and for good and sufficient reasons calling therefor. In the present case it is proposed to take sixteen causes out of the other courts and to transfer them to this

Graham v. Selover.

court, because five causes are pending here. The same rule would have allowed the transfer, if only one action were pending here. Such was not, in my opinion, the intent of the statute, and the adoption of it would lead to encourage such motions to an extent which would be embarrassing to the court and to suitors.

CARDOZO, J., dissented.

The judges before whom the above case was heard having disagreed, the same was ordered to be sent to the 2d department. (*See act of April 27, 1870, relating to the Supreme Court, § 6.*)

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham*, P. J. and *Cardozo*, Justice.]

GRAHAM vs. SELOVER.

On the 23d of November, 1850, the plaintiff sold to the firm of M. & H. certain property for \$20,500, payable, \$5000 in cash, \$5500 in the note of M. & H. and \$10,000 in the draft of M. & H., on S. & Co., at three months. The purchase was made for the benefit of M. & H. alone, and the draft was accepted by S. & Co., (of which firm M. was a member,) for the accommodation of the plaintiff. In December, 1850, the plaintiff placed the acceptance in the hands of A. & Co., as his agents, and as security for advances made to him, and informed M., before it matured, that A. & Co. had the same for collection, with full power to settle with them. In May, 1851, S. & Co. became insolvent, and in October, 1851, the firm was dissolved. In August, 1852, A. & Co. accepted the individual notes of M. for \$4000 in full for said acceptance, which notes were paid to A. & Co., and the acceptance delivered to M. Subsequently, A. & Co. rendered an account of said settlement, to the plaintiff, and paid him the balance due to him, informing him that they had delivered the acceptance to S. or to M. On the 27th of October, 1851, when the firm of S. & Co. was dissolved, M. assumed all the debts and liabilities of the firm, and gave to S. a bond to indemnify him against the same. In an action commenced by the plaintiff March 20, 1866, against

Joslyn v. Fisk.

authority for the clerk to transfer the papers to any county clerk.

The portion of the order appealed from which directs the papers to be given to the clerk of the city and county of New York, would not be a compliance with the statute, because there is no direction in the order where the trial is to be had, and if such papers were filed in any other county than that in which the trial was ordered, it would not be according to the intent of the act. The fact, also, that this provision is confined to transitory actions, and that no authority exists for the removal of local actions, affords a strong presumption that the intent of the legislature was to confine this power to cases in which it was necessary to change the place of trial.

From the suggestions above made, I have come to the conclusion that it was not the intent of the legislature to authorize the removal of such causes except upon an application showing the propriety of changing the place of trial from the city of New York. In looking at the grounds on which the removal is asked for, there is but one which could not be made applicable to any cases in which one action is brought in this court, and one in either of the other courts for similar causes of action; and that is that the decision of this court would not be binding on the other courts, nor would it be followed by them unless that court concurred in its correctness. It must, however, be remembered that those courts are, as to their decisions, of coördinate authority with this court; that appeals are to be made directly from those courts to the Court of Appeals, in the same manner as in this court. While suitors are allowed to select the court in which they will bring their actions, that privilege should not be interfered with, except in cases clearly authorized by law, and for good and sufficient reasons calling therefor. In the present case it is proposed to take sixteen causes out of the other courts and to transfer them to this

Graham v. Selover.

court, because five causes are pending here. The same rule would have allowed the transfer, if only one action were pending here. Such was not, in my opinion, the intent of the statute, and the adoption of it would lead to encourage such motions to an extent which would be embarrassing to the court and to suitors.

CARDOZO, J., dissented.

The judges before whom the above case was heard having disagreed, the same was ordered to be sent to the 2d department. (*See act of April 27, 1870, relating to the Supreme Court, § 6.*)

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham*, P. J. and *Cardozo*, Justice.]

GRAHAM vs. SELOVER.

On the 23d of November, 1850, the plaintiff sold to the firm of M. & H. certain property for \$20,500, payable, \$5000 in cash, \$5500 in the note of M. & H. and \$10,000 in the draft of M. & H., on S. & Co., at three months. The purchase was made for the benefit of M. & H. alone, and the draft was accepted by S. & Co., (of which firm M. was a member,) for the accommodation of the plaintiff. In December, 1850, the plaintiff placed the acceptance in the hands of A. & Co., as his agents, and as security for advances made to him, and informed M., before it matured, that A. & Co. had the same for collection, with full power to settle with them. In May, 1851, S. & Co. became insolvent, and in October, 1851, the firm was dissolved. In August, 1852, A. & Co. accepted the individual notes of M. for \$4000 in full for said acceptance, which notes were paid to A. & Co., and the acceptance delivered to M. Subsequently, A. & Co. rendered an account of said settlement, to the plaintiff, and paid him the balance due to him, informing him that they had delivered the acceptance to S. or to M. On the 27th of October, 1851, when the firm of S. & Co. was dissolved, M. assumed all the debts and liabilities of the firm, and gave to S. a bond to indemnify him against the same. In an action commenced by the plaintiff March 20, 1866, against

Graham v. Selover.

the defendant, to recover the balance of an account stated, of the amount remaining due upon the acceptance; it was

Held, 1. That the plea of the statute of limitations was a good defense; and this, whether the amendment of 1867 was applicable, or not.

2. That the payment of the \$4000, in August, 1852, was not a *novation* of the contract, so far as S. was concerned, so as to make the statute commence running only from that time.

3. That the payment of \$4000 having been made by M. after the dissolution of the firm of S. & Co., (of which he was a member,) and there being no evidence that S. had anything to do with it, or authorized it, he was not bound or affected by such payment.

4. That whether such payment was made before or after the action was barred by the statute of limitations made no difference. That in neither case did the payment affect the running of the statute, as to the partner who did not make or authorize it.

A PPEAL from a judgment entered upon the report of a referee, dismissing the complaint, with costs.

The action was brought to recover the balance of an account stated, upon an indebtedness accruing to the plaintiff from the defendant, upon an acceptance given in San Francisco, November 23, 1850. The defendant pleaded the general issue, and the statute of limitations.

The facts, as found by the referee, were as follows: The firm of Middleton & Hood was composed of John Middleton and John M. Hood, and the firm of Selover & Co. was composed of the defendant S. and said John Middleton. On the 23d of November, 1850, the plaintiff sold to Middleton & Hood certain property for \$20,500, payable, \$5000 in cash, \$5500 in the note of Middleton & Hood, and \$10,000 in the draft of Middleton & Hood on Selover & Co., at three months. The purchase was made for the benefit of Middleton & Hood alone, and the draft was accepted by Selover & Co. for the accommodation of the plaintiff. In December, 1850, the plaintiff placed this acceptance in the hands of Argenti & Co., as his agents, and as security for advances made to him, and informed Middleton, before it matured, that Argenti & Co. had the same for collection, with full power to settle with them.

Graham v. Selover.

In May, 1851, Selover & Co. became insolvent. In August, 1852, Argenti & Co., acting under this authority, accepted the individual notes of John Middleton for \$4000, in full for said acceptance, which notes were paid to Argenti & Co., and the acceptance delivered to Middleton. Subsequently, Argenti & Co. rendered an account of said settlement to the plaintiff, and paid him the balance due to him, and informed him that they had delivered the acceptance to Selover or to Middleton. On the 27th of October, 1851, the firm of Selover & Co. was dissolved, and Middleton assumed all the debts and liabilities of the firm, and gave to Selover a bond to indemnify him against all debts and liabilities of the said firm. The referee also found that more than six years had elapsed since any cause of action set forth in the complaint accrued in favor of the plaintiff, against the defendant. He accordingly found, as a conclusion of law, that the defendant was entitled to judgment against the plaintiff, for the dismissal of the complaint, on the merits, with costs. The plaintiff appealed to the general term.

John Graham, for the appellant.

Coles Morris, for the respondent.

By the Court, CARDOZO, J. It is not disputed that the statute of limitations is a defense to the second cause of action contained in the complaint. I am of opinion that that plea is also an answer to the first cause of action, and that whether the amendment of 1867 is or not to be considered applicable to the case. If that amendment applies, of course the period of limitation would have expired. But if it does not—and I express no opinion on that point—I still think the cause of action barred, even deducting from the referee's calculation the absences in Europe and Missouri, which the appellant insists the

Graham v. Selover.

referee should have deducted. The point where I differ from the learned counsel for the appellant is as to the time when the cause of action accrued. He claims that the payment of the \$4000 in August, 1852, was a novation of the contract, and that the statute only commenced to run from that period. This, I think, is a mistake, so far as Selover is concerned. The partnership of Selover & Co. was dissolved in October, 1851, and Selover transferred all his interest in its property, assets and credits to Middleton, who agreed to indemnify him against the debts and liabilities.

The payment in August, 1852, was made by Middleton after the dissolution. There is no evidence that Selover had anything to do with it, or that he authorized it in any way. It is settled that such a payment has no effect, so far as he is concerned. (*Van Keuren v. Parmelee*, 2 N. Y. 523. *Winchell v. Hicks*, 18 id. 558.) Whether the payment be made before or after the action is barred by the statute of limitations, makes no difference. (*Shoemaker v. Benedict*, 1 Kern. 176.) In neither case does the payment affect the running of the statute, as to the partner who did not make or authorize it.

The judgment should be affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

IN THE MATTER OF THE PETITION OF WILLIAM REMSEN, to vacate an assessment for paving Sixth Avenue, from 42d to 59th streets, with Nicolson pavement.

The act of the legislature, of April 26, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881*), does not apply to cases which had arisen prior to the passage of that act, although argued, at special term, subsequently to its passage.^(a)

APPEAL from an order made at special term, vacating an assessment for paving Sixth avenue in the city of New York from 42d street to 59th street, with Nicolson pavement.

The proceeding was instituted under the act of the legislature in relation to frauds in assessments for local improvements in the city of New York. (*Laws of 1858, p. 574*.) The assessment list purported, on its face, to have been made under and by virtue of a resolution and ordinance of the common council of the city, adopted March 7, 1868. The assessment was confirmed by the board of revision and correction of assessment lists, on the 27th of January, 1870. William Remsen was the owner in fee of a certain block of ground on the east side of Sixth avenue, included in the assessment, and claiming to be aggrieved by such assessment, he presented a petition to this court, alleging that the same was irregular and invalid, for various reasons therein specified, and praying that such assessment might be vacated, and the lien created thereby cancelled. Proofs were taken, and the argument thereon, at special term, took place in July 1870. The justice holding the special term held that the act of the legislature of April 26, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881*), applied to the case. He therefore modified the assessment, by ordering certain illegal items

(a) See *Matter of Eager et al.*, 58 Barb. 557.

In the matter of Remsen.

to be deducted therefrom; and the petitioner, Remsen, appealed to the general term.

A. R. Lawrence, Jr., for the appellant.

David J. Dean, for the mayor &c. of New York.

At the general term held in the first department, in April 1871, the case came before the court for argument, on the appeal. And it appearing that the case arose, and the proofs were all taken, *before* the act of the legislature of this State, of April 26, 1870, (*Laws of 1870, p. 881*), was passed, although the argument at special term was had *subsequently*,

The COURT decided, orally, that the act of 1870 did not apply to or affect the case, in any manner; and that therefore the order below should have been to *vacate* the assessment, entirely, instead of *modifying* it.

The order appealed from was therefore *reversed*, and the *assessment vacated*.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 4, 1871. *Ingram*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

FLINT & BOOTH vs. CRAIG.

It is not every alteration that will destroy an instrument. In order to produce that effect, the alteration must be material.

The general rule is that any alteration which in any event may alter the promisor's liability is material, and vitiating, if made without his consent at the time, or approval afterwards; otherwise not.

Where a note is given payable "to the order of" certain persons named, and after its delivery by the makers, the holders, without the knowledge or consent of the makers, erase the words "to the order of," and insert the words "or bearer," this is an alteration which does not change or affect the liability of the makers; and unless it can be seen that their liability may possibly be affected prejudicially, by the alteration, it does not vitiate and destroy the note; *it seems*.

Even assuming that such an alteration was in fact made, and is material, still it is not necessarily a forgery; that depending upon the intention with which the alteration was made. A fraudulent or felonious intention is not to be presumed, but is to be proved.

Although an alteration, in a promissory note, be material, so that the makers might, if they should so elect, avoid payment, upon the ground of the unauthorized alteration, yet as they might, upon inquiring into the facts and circumstances, ratify the alteration, and thus render the note perfectly valid; or consent to pay it without regard to such alteration; and as it would be but just that they should do so, the law will infer that they would.

But this is a question which concerns the makers, alone. A third person who is not a party to the note, nor in privity with any one who is a party, has no interest in the question, nor right to assume that the makers will refuse to pay, on account of the alteration.

A person to whom a promissory note, made by another, has been turned out, by the holders, as collateral security for the payment of a loan, and who, on demand of the note, after payment of the loan, refuses to redeliver it, cannot, in an action by such holders, to recover for the wrongful conversion of the note, set up the defense that a material alteration, has been made, in it, since it was executed; either as a bar to the action, or to mitigate the damages.

The whole matter and subject of the alteration of the note is, as between the parties to such action, wholly irrelevant and immaterial, for any purpose.

The defendant is to be deemed and taken as having no interest in the note, any more than one would have who had obtained possession of the property of another, by any tort or larceny. He is neither lawful owner nor lawful holder. His possession is without right, and by means tortious, and through a breach of trust.

No person is allowed to defend an action upon a question which does not concern him, and in which he has no lawful interest.

Flint v. Craig.

MOTION for a new trial, upon exceptions taken at the circuit.

The complaint alleged that on the 10th day of December, 1860, the plaintiffs were partners in business, under the name of J. L. Booth & Co.; that on said 10th day of December, 1860, the firms of Bradley & Norton and Hart & Glass, at Racine, in the State of Wisconsin, made their promissory note in writing, dated that day, whereby, for value received, they promised to pay to said plaintiffs, by their firm name of J. L. Booth & Co., or bearer, two years after date, at Racine County Bank, \$1500, with interest at seven per cent the first year, and interest at ten per cent the second year, and then and there delivered the same to the plaintiffs; that interest at the rate of ten per cent by agreement of the parties was lawful and authorized by statute in the State of Wisconsin, where said note was given, and was by the terms thereof payable; that afterwards, and on or about the 7th day of February, 1862, the defendant advanced to the plaintiffs about the sum of \$500, and thereupon the plaintiffs delivered to said defendant the aforesaid promissory note to be, by said defendant, collected to reimburse himself for such advance, and to pay over to the plaintiffs the balance of the proceeds of said note, or as security for the money so advanced by said defendant to the plaintiffs.

The plaintiffs further alleged, that they had repaid to the defendant the money so advanced by him to them upon the said note, and the whole thereof, and that said defendant has no interest in or lien upon the said note, but that he still retains the same in his possession, and the same remains wholly unpaid.

And the plaintiffs further alleged that after they had repaid to said defendant the money so advanced by him to them, they demanded of him the said promissory note, but the defendant refused, and still does refuse, to deliver the said promissory note to the plaintiffs, but on the

Flint v. Craig.

contrary thereof, had converted the same to his own use, whereby the plaintiffs had sustained damages to the amount of \$2000. Whereupon the plaintiffs demanded judgment against the defendant for the sum of \$1500, with interest thereon from the 10th day of December, 1860, for one year, at seven per cent, and at ten per cent after the first year, besides costs.

The defendant, by his answer, admitted the partnership of the plaintiffs, and that the rate of interest in the complaint specified was lawful at the time and place, when and where, the instrument purported to have been made, but he denied each and every other allegation in said complaint contained.

And the defendant alleged and insisted that the paper writing called in said complaint a promissory note, and in said complaint described, was, at the time it was delivered to him, invalid and of no effect or value, for the reason that after the execution of said paper by said Bradley & Norton and said Hart & Glass, and after its delivery to the plaintiffs herein, it was, without the consent of said Bradley & Norton or said Hart & Glass, or either of them, altered in a material part by striking out of said paper writing the words, "the order of," and inserting the words "or bearer,"

And for a second, and further and separate answer, the defendant admitting the truth of the allegations in said complaint, as are in the above defense admitted, and denying the others, as above stated, further alleged, that after the delivery of said note to said J. L. Booth & Co., as in said complaint stated, they, the said J. L. Booth & Co., for a valuable consideration to them paid, duly sold, assigned and transferred to the said Charles L. Flint the said note, before the maturity thereof, and the said Flint did thereafter, for the sum of \$500 to him paid, sell, assign, indorse and deliver said note to the defendant, who thereby became, and has since continued to be, the sole owner and

Flint v. Craig.

holder of said note. That upon the maturity of said note, the same was not paid, and the said Charles L. Flint was duly charged and made liable as indorser thereon; and soon thereafter, and on or about the 23d day of February, 1863, the defendant commenced an action in this court against Flint, upon said note and indorsements; that Flint appeared in said action, and as a defense thereto, set up, in substance, the same matters that are set forth and alleged in the complaint herein, except that the said Flint then claimed to be the only person interested in, or owning said note, and especially that this defendant had no interest, right or title to said note, except for the purposes of collecting the same of the makers thereof for this defendant's benefit, to the extent of \$500, and interest, and to collect the balance, and pay over the same to the said Flint. That on or about the 13th day of October, 1864, the issues in said action were duly brought to trial at a circuit term of this court, held in and for Monroe county, and such proceedings were had, that on the 14th day of October, 1864, this defendant recovered judgment in said action against said Flint for the sum of \$593.85 damages, and \$111.65 costs. That in and by said judgment, it was, among other things, adjudged and determined, that the said note, prior to its indorsement and delivery to this defendant, belonged to the said Flint, and that it was duly, and for value, sold, assigned and delivered by said Flint to this defendant, who thereby became the owner thereof; and further, that the facts set up in the answer of said Flint therein as a defense to this defendant's action are the same matters which are now set up in the complaint herein, as and for a cause of action against this defendant.

And for a third defense, the defendant, after admitting the truth of such of the averments in the complaint as were in his first defense admitted, denied each and every of the other averments in said complaint contained; and further alleged that previous to the maturity of the said

Flint v. Craig.

note, and before the commencement of this action, the said Booth sold, assigned and transferred to the said Flint, for a valuable consideration to him paid, all his, the said Booth's interest in said note, and Flint thereupon became sole owner thereof, and that Booth had not, nor did he have at the commencement of this action, any interest in the same.

The action came on to be tried at a circuit court held in and for the county of Monroe, in October, 1870, before Justice J. C. SMITH and a jury, when the plaintiffs, to maintain the issue on their part, gave evidence tending to show that on and prior to the 7th day of February, 1862, the plaintiffs were the owners of the promissory note mentioned and described in the complaint, and that the same was duly executed by the makers thereof; and that on the day last aforesaid, the plaintiff Charles L. Flint, deposited said note with the defendant as collateral security for the repayment of the sum of \$500 then borrowed by him of said defendant; that afterwards, and before the demand hereinafter mentioned, was made, Flint repaid to the defendant the said sum of \$500, and all interest thereon; that afterwards and before the commencement of this action, the plaintiffs demanded of the defendant that he deliver up and surrender said note to the plaintiffs, but that the defendant refused so to do. The plaintiffs then rested their case.

The defendant thereupon, to maintain the issue on his part, gave evidence tending to prove that the said note was not deposited with him as such collateral security, but that the same was purchased by him of the plaintiffs absolutely; also evidence tending to prove that when the note in the complaint set forth was made and executed by Hart & Glass, and Bradley & Norton, and delivered by them to the plaintiffs, it was payable by its terms to the order of J. L. Booth & Co.; that after its execution and delivery as aforesaid, it was, by the plaintiffs, and without the consent

Flint v. Craig.

of said Bradley & Norton or Hart & Glass, or either of them, altered by striking out of said note the words, "the order of," and inserting the words, "or bearer."

The plaintiff then gave evidence tending to prove that no such alteration of the note had taken place, but that the same was in all respects in its present condition when executed by the makers thereof.

The evidence was then closed, and the case was submitted to the jury. The judge, in his charge to the jury, instructed them, among other things, as follows: That if the said promissory note was, after the execution and delivery thereof to the plaintiffs, altered in the respects claimed by the defendant, by the plaintiffs, or either of them, or by the procurement, or with the assent of them, or either of them, without the knowledge or assent of the makers thereof, then the plaintiffs in this action could not recover, and they should render their verdict for the defendant; to which ruling and instruction of the court, the counsel for the plaintiffs excepted. The jury, after deliberation, rendered their verdict for the defendant. The court thereupon ordered a stay of proceedings to enable the plaintiffs to move for a new trial at the general term, in the first instance.

W. F. Cogswell, for the plaintiffs.

I. The court erred in instructing the jury that if the note was altered in the respect stated in the bill of exceptions, the plaintiffs were not entitled to recover.

The right to maintain the action of trover for the conversion of choses in action is well established. It has been held, both in England and this State, to exist in the case of the plaintiffs' own paper, when the wrongdoer has parted with the same to a *bona fide* purchaser, so as to give such purchaser a right of action against the plaintiff. (*Decker v. Mathews*, 12 N. Y. 313, and cases cited.) In such action the measure of damages is *prima facie* the amount

Flint v. Craig.

due on the security. (*Sedg. on Dam. 4th ed. 569, and cases cited.*) In enunciating this general rule the judges of the courts have sometimes remarked that the defendant might reduce such damages by showing payment, insolvency of the maker, or the invalidity of the security. This statement has thence been adopted into the text books. Its correctness as a general proposition, and its applicability to this case, is now before this court. Except with very decided limitations and qualifications, I deny its correctness. One peculiarity in reference to negotiable paper should be borne in mind in considering the question, and that is, that a wrongdoer may transfer a good title to a bona fide purchaser, even as against the real owner. Take then the second branch of the proposition: A person comes wrongfully into possession of a negotiable note or bill of exchange, and has it discounted at a bank, the owner sues, and when the trial comes on, the maker or drawer is or claims to be insolvent. The defendant gives evidence of such fact, and defeats the plaintiff's recovery, or reduces the damages to a merely nominal amount. On what principle does the defendant deprive the plaintiff of the chance of the maker's acquisition of property? Is such a thing so strange in our country as to be ignored by the courts. But suppose the plaintiff is prepared to show that the maker, although nothing can be collected of him upon execution, has fraudulently disposed of property; is the court to sit and try that question in such an action? The wrongdoer certainly should not be the subject of especial leniency on the part of the court. Or, take the case before this court; the defendant says that after this note was delivered to the plaintiffs, it was changed so as to make it negotiable by delivery instead of by indorsement; what right has he to urge that? That (assuming it to have been a material alteration) would have constituted a good defense to the makers on the note, but how can the defendant urge that objection; what business is it to him?

Flint v. Craig.

Shall he be allowed to interpose a defense for them which they would not? Perhaps they have already, with full knowledge of the alteration, assented to the same, or perhaps they would have done so had the plaintiffs presented the note. Shall the defendant deprive the plaintiffs of their right to seek to enforce the note, and if they could not do that, to recover on the original consideration, which they might perhaps do on surrendering the note? I submit, there can be but one answer to these questions. It should be observed that the defendant has made no attempt to collect this note. The case of *Goggerley v. Cuthbert*, (5 Bos. & Pul. 170,) will be found to be in point, as I think.

II. The alteration was not a material one. It did not affect or change, in any degree, the character of the note, or enlarge or modify the obligation of the makers. (*Footte v. Bragg*, 5 Blackf. 363. *Farquhar v. Southey*, *Moody & Malkin*, 14.)

Geo. F. Danforth, for the defendant.

I. The exception to the charge was not well taken. 1. In this action the measure of damages is *prima facie* the amount due on the note, but the defendant was at liberty to reduce that valuation by showing any fact tending to invalidate the note. (*Sedg. on Dam.* 488. *Potter v. Merchants' Bank*, 28 N. Y. 642. *Allen v. Suydam*, 20 Wend. 335. *Ingalls v. Lord*, 1 Cowen, 240.) As payment of the note or release of the makers from liability; (*Barmon v. Lithauer*, 4 Keyes, 317;) or insolvency of the makers; (*Potter v. Merchants' Bank*, 28 N. Y. 642; *Gellatly v. Lowery*, 6 Bosw. 113;) or that it was drawn without authority; (*Matthews v. Sherwell*, 2 Taunt. 430.) And, with much greater reason, that the makers of the note have been discharged from liability and the note itself rendered void, and, of course, valueless. An insolvent man might acquire property; but a note rendered invalid cannot be

Flint v. Craig.

the foundation of an action or ground of recovery. 2. The alteration in this case rendered the note void. It is a material alteration. A note payable to a particular person, or to such person as he may appoint, is very different from one payable to anybody. The maker agrees in the one case to pay a certain person named, or such other as he may appoint. No one can so change the contract as to render him liable to pay under any other circumstances. The alteration in question does that, and so changes the liability. The note was perfect when delivered, and any change in any of its terms was material. 3. The defendant can avail himself of the objection. The action is trover, not replevin. And the only question is as to the value of the note. This having been altered in a material part, without the consent of the makers, was rendered void and without value; and is a defense, upon the same principle which permits a sheriff sued for an escape to show that the judgment or execution was void. (*Cornell v. Barnes*, 7 Hill, 35. *Phelps v. Barton*, 13 Wend. 68. *Carpentier v. Willet*, 6 Bosw. 35.)

II. A new trial should be denied, and judgment ordered upon the verdict, for the defendant.

By the Court, JOHNSON, J. The case presents but a single point, which arises on exception to the charge of the judge to the jury. The action was for the wrongful conversion, by the defendant, of a certain promissory note, made by the two firms of "Bradley & Norton," and "Hart & Glass," for \$1500, payable to the plaintiffs, or bearer, as alleged in the complaint. The plaintiffs claimed, and gave evidence tending to prove, that they turned out this note to the defendant as collateral security for the payment of \$500 borrowed by them of the defendant. The \$500 was paid and the note demanded of the defendant, who refused to deliver it, claiming that he had purchased it of the plaintiffs. Evidence was given by the defendant

Flint v. Craig.

tending to prove that the note was purchased by him, absolutely, of the plaintiffs. The defendant also gave evidence tending to prove that the note, when made and delivered by the makers to the plaintiffs, was payable "to the order of" the plaintiffs, and that after its delivery by the makers, the plaintiffs, without the knowledge or consent of the makers, or either of them, erased the words "the order of" and inserted the words "or bearer." The plaintiffs gave evidence tending to prove that the note was, at the time of the trial, in all respects as it was when delivered to them by the makers, and that no alteration had been made by them. The judge charged that if the note, after the execution and delivery to the plaintiffs, had been altered by them, in the respect claimed, without the knowledge or assent of the makers, the plaintiffs could not recover, and their verdict should be for the defendant. The jury found for the defendant, and the plaintiffs move for a new trial on their exception to this portion of the charge. If the charge was erroneous, the plaintiffs have the right to assume that but for the erroneous charge they would have succeeded in obtaining a verdict in their favor; and the case is to be examined in that aspect. The exception properly raises two questions: 1. Whether the alteration, if made, as claimed by the defendant, vitiates the note entirely, and renders it void and worthless; and, 2. Whether the defendant can set up this defense against the plaintiffs in this action, either as a bar to the action, or on the question of damages.

No case has been cited, and from my examination I am confident that none can be found, either in this country or in England, upon the precise point of an alteration like this, assuming it to have been made as claimed. And whether it would avoid the note, so that no action could be maintained upon it, against the makers, must depend upon the general principles established by the numerous

Flint v. Craig.

decisions in respect to the alteration of such instruments, after delivery, without the maker's consent.

It is not every alteration that will destroy an instrument. In order to produce that effect the alteration must be material.

It has been held, very properly, that the insertion of the words "bearer" or "order" in a note, after delivery, which were not there before, was a material alteration, which would render the note void, because it changed the nature and character of the instrument, and might deprive the maker of his right of set-off against the payee. (*Bruce v. Westcott*, 3 Barb. 374, and cases there cited.) But an alteration or addition to supply, or declare the intention of the parties, will not have that effect. Thus a *bona fide* holder of a bill accepted, payable to ——— or order, may insert his own name as payee, without rendering the bill void.

So a mistake may be corrected, and words inserted which express what the law implies. (*Atwood v. Griffin*, 2 C. & P. 368; 12 E. C. L. 176. *Chitty on Bills*, 206, 207, ed. of 1836. 2 *Par. on Notes and Bills*, 562, 563.) The general rule deducible from all the authorities seems to be, that any alteration which, in any event, may alter the promissor's liability, is material and vitiating, if made without his consent at the time, or approval afterward; otherwise not. (2 *Par. on Notes and Bills*, 564.) This is certainly a reasonable and sufficient test, and I think may be safely laid down as the true one. Tried by this test it is certainly difficult to see how the promissors in the note in question could by any possibility be injured, or their liability be affected by this alteration. They are both words which import negotiability, and without which, or some equivalent term, an instrument would not possess that quality. No one, I suppose, would contend that where a note was given payable to "bearer," the erasure of that word and the insertion in its place of the word

Flint v. Craig.

holder, without the maker's consent, would vitiate it. They are equivalent terms, in such instruments, and have in law precisely the same meaning. And so the word "order" confers upon the instrument the same quality. It imports and expresses negotiability, the same as either of the other terms, and is in law a contract with any lawful holder. The only difference is in the form of the transfer to third persons so as to give them a good title. But this form or manner of negotiating the instrument by the payee does not, as I conceive, affect in any manner or degree the interests or liability of the promissor. After the payee has indorsed such a note in blank, it passes from hand to hand by delivery, the same as though it was originally payable in terms to bearer. And he may avoid all personal liability by adding "without recourse to me," to his signature.

In that condition it is a note payable to bearer, to all intents and purposes. And unless it can be seen that the liability of the makers may possibly be affected prejudicially, by the alteration, it does not vitiate and destroy the note. The intention of the promissors to have it a negotiable instrument has not been frustrated, or in any degree affected by the alteration.

But in the view I have taken of this case, it is unnecessary to decide the question above considered. It may be assumed, for the purposes of this point, that the alteration was in fact made as alleged, and is material; still it is not necessarily a forgery. That depends upon the intention with which the alteration was made. Unless it was made with a fraudulent or felonious intent, it does not constitute a forgery. Such fraudulent or felonious intention is not to be presumed, but is to be proved, and this was not done, nor was any such question raised or passed upon by the jury. As the case stood upon the trial, it was simply the case of a note altered, without the consent of the makers, in a manner deemed to be material. But the

Flint v. Craig.

promissors had not been called upon to pay it; and for aught that appears, or that could properly be made to appear, in such a case, stood ready and willing to pay it, to any lawful owner and holder. It is to be presumed that the debt represented by the note was a just and honest debt of the makers; and although the alteration was material, so that they might, if they should so elect, avoid payment upon the ground of the unauthorized alteration, yet they might well, upon inquiry into the facts and circumstances of the alteration, and becoming satisfied that it was made without any intention of injuring or defrauding them, or of committing a felony, ratify the alteration, and thus render the note perfectly valid, or consent to pay it, without regard to such alteration. And as it would be but just that they should do so, in such case, the law will infer that they would. But this is a question which concerns them alone, and in which no person other than a lawful owner and holder has any interest or voice whatever. The defendant certainly had no interest in this question. He was not a party to the note, nor in privity with any one who was a party. He had no right to assume that the maker would refuse to pay on account of the alteration, much less, through his own wrong, place both maker and payee and owner, in a situation, through the judgment of the court, in which they could not lawfully pay the true owner, should they be disposed to do so. In this aspect of the case, the defendant is to be deemed, and taken, as having no interest in the note, any more than a person would have who had obtained possession of the property of another by any tort or larceny. He is neither lawful owner nor lawful holder. His possession is without right, and by means tortious and through a breach of trust. Standing in this situation, it would be strange indeed if the law should be found to be, not only a shield to the defendant in his wrong doing, but a sword also in his hand, for further and more effective aggression

Flint v. Craig.

upon the plaintiffs' rights. Such is not the law. It is not justly subject to any such reproach. No person is allowed to defend an action upon a question which does not concern him, and in which he has no lawful interest. It does not follow, that because the makers of the note might defeat an action if brought against them, on such note, upon the ground of the alteration, the defendant can use it, either as a full defense or in mitigation of his tort.

The alteration might be material to the makers, when required to pay, but would be wholly immaterial to one who had no interest in the note, and whose possession was unlawful. This principle, which denies the right to a party to an action to defend on a question or matter in which he has no legitimate concern or interest, is fully illustrated in the cases of *Campbell v. Erie Railway Co.*, (46 Barb. 540,) and the *City Bank of New Haven v. Perkins*, (29 N. Y. 554.) The exception noticed in the case last cited applies with full force to the note in the defendant's hands, should he attempt to enforce it against the makers. Should he bring an action against them, they might defeat the action, even though the alteration had not affected the validity of the note, simply upon the ground that his possession was tortious, and that he could not by his own fraud or wrong, acquire a right of action against any one.

It is said, however, in behalf of the defendant, that this evidence of alteration, if not admissible as a strict defense or bar to the action, was competent by way of mitigating damages, and upon the value of the obligation. It was clearly put to the jury, as a defense in the nature of a bar to the action; and in this respect the charge was clearly erroneous. But even upon the question of damages, by way of showing the value of the note, the matter was wholly inadmissible as between these parties.

As has been already said, the question of the alteration was no test of the value of the note to the payees, or to any lawful holder. *Non constat*, the makers were willing

Flint v. Craig.

to ratify the alteration and acknowledge their liability. They might do so, and then, confessedly, the note was worth the amount promised. And whether they would or would not, was a question which could not have been litigated upon the trial. It would have been incompetent proof, had it been offered, that the makers did not intend to pay. It would have been matter of speculative opinion merely, had the proof been offered. Even had the makers resolved and declared their intention to defend against the plaintiffs, on account of the alteration, it was of no consequence, as cooler reflection and a sense of their moral obligation might lead to a different frame of mind, and better resolutions afterwards.

My conclusion therefore is, that the whole matter and subject of the alteration of the note in question was, as between the parties to this action, wholly irrelevant and immaterial for any purpose. The makers of the note are presumed to be able to pay it; and if they are willing to do so, as they will also be presumed, as between these parties, to be, the note is, as matter of law, worth what it promises to pay; and if the defendant has no right or title, except what he gets by his tort, the measure of damages should be the amount promised, with interest. It is plain that the market value would afford no just measure of compensation, after the defendant has by his wrongful acts and conduct thrown discredit upon the note. If he persists in wrongfully withholding the note from the true owners, it should be, as an obligation of good name and credit, as when he received it from the plaintiffs, to hold as a security. And he must be required to respond upon that basis.

A new trial must therefore be granted, with costs to abide the event.

New trial granted.

GEORGE W. TUTTLE vs. MICHAEL HEAVY and others.

Where real estate belonging to infants is sold by order of the county court, and a bond and mortgage given to the special guardian (who is also general guardian) of the infants, to secure the payment of a part of the purchase money, he has power to sell and assign such bond and mortgage, and can, by such sale and assignment, give the purchaser a perfect title thereto.

No order, from any court, is necessary to enable a guardian to make such an assignment, or to establish its validity.

ACTION to foreclose a mortgage. The mortgage, and the bond collateral thereto, were originally given by the defendant Michael Heavy, to William McCarthy, as special guardian of certain infants, and were claimed to have been assigned to the plaintiff, by said William McCarthy, under and in pursuance of an order made in the county court of Monroe county, by the special county judge.

The defendant Michael Heavy was the only one who appeared and answered. He, by his answer, alleged and insisted, 1. That William McCarthy, as special guardian, had no power or authority to assign, sell or transfer the bond and mortgage set forth in the complaint, or either of them, and that by reason thereof the plaintiff was not the owner thereof, or of the moneys due or to grow due thereon, nor was the said plaintiff entitled to bring any action thereon. That the said bond and mortgage was executed and delivered to the said William McCarthy, as special guardian of Thomas P. McCarthy, Alice P. McCarthy and Dennis McCarthy, infants, who then were and still are under the age of twenty-one years; that at the time of the pretended order of sale of said bond and mortgage to the plaintiff, the said infants were of the ages, respectively: the said Thomas P. of the age of fourteen years, the said Alice P. of the age of about twelve years, the said Dennis about the age of ten years; that neither of the said infants joined in said petition. That the said

Tuttle v. Heavy.

pretended order of sale was granted by George W. Rawson, Esq., special county judge for Monroe county; that the county court of Monroe county was held at that time by the Hon. Jerome Fuller, county judge for said county, and that the latter was not at that time in any way incapacitated from holding said court. 2. And the defendant, for a further and separate answer, alleged that he was not nor is he now indebted to the plaintiff on the said bond and mortgage in any sum whatever; and that there was not on the 1st day of March, 1870, nor at any time since, any sum of money due or owing on the said bond and mortgage to the said plaintiff.

The action was tried at a special term, before a justice of this court, without a jury. When the plaintiff rested, the defendant moved that the plaintiff be nonsuited, and the complaint dismissed on the grounds:

1. That the county court had no power or jurisdiction to order the sale or assignment of the said bond and mortgage; and that said assignment was void and no title passed.

2. That the special county judge had no such power or authority.

3. That the Supreme Court at special term had no jurisdiction of the matter, and could not confirm said sale or assignment, nor confirm the order made by the special county judge, and that the order made at the said special term was void for want of jurisdiction.

4. That no title to the said bond and mortgage ever passed to the plaintiff, and hence he could not maintain this action.

The court denied the motion, and the defendant's counsel excepted.

The defendant then offered to prove: That at the time of the making of the said order, by the special county judge, the county judge was in the county of Monroe, able to attend to business, and not in any way incapaci-

Tuttle v. Heavy.

tated therefrom. This offer was overruled by the court; to which ruling and decision the defendant's counsel excepted.

The cause was then submitted, when the said court found as facts: That on the 3d day of March, 1865, the defendant, Michael Heavy, made and executed his bond in the penal sum of \$2700, conditioned to pay William McCarthy as special guardian of William P. McCarthy and others, his infant children, of whom the said William McCarthy was also general guardian, duly appointed by the surrogate of the county of Monroe, the sum of \$1350.50, in five equal installments with semi-annual interest on all sums unpaid, the interest to commence April 1, 1865; that said sum was made payable to said William McCarthy, as special guardian aforesaid, his heirs, executors, administrators or assigns; and that at the same date with said bond, the said Michael Heavy executed a mortgage, under his hand and seal, of the premises mentioned in the complaint, to secure the payment of said \$1350.50, on like terms and conditions as mentioned in said bond, and then and there delivered said bond and mortgage to the said guardian *ad litem*; that the mortgagor has paid on account of the principal the sum of \$770.25, leaving due and unpaid, on account of said principal, the sum of \$579.75, and interest on that sum from and after October 1, 1869; that said mortgage was recorded in Monroe county clerk's office, March 13, 1865, in liber 120 of mortgages, at page 2. That on the 4th day of December, 1868, the said bond and mortgage, and the debt due and to grow due, was duly sold, assigned and transferred to the plaintiff by the said guardian *ad litem*, by an assignment duly signed and sealed by said guardian *ad litem*, and that the plaintiff is the lawful owner and holder of said bond and mortgage; that said assignment was duly recorded in said clerk's office in liber 7 of assignments of mortgages, at page 363, December 17, 1868; that the county court

Tuttle v. Heavy.

of the county of Monroe authorized and directed said assignment, and that the Supreme Court has sanctioned the same.

To all of which said findings of fact the defendant excepted.

The said court also found as conclusion of law: That the plaintiff is entitled to foreclosure and sale of the mortgaged premises and payment of the debt and interest out of the proceeds of said sale, with costs of the action, and an execution against the said Michael Heavy for any deficiency of said debt and interest that said proceeds may leave unpaid, and that the other defendants be barred and foreclosed of all rights and interest in the mortgaged premises, except as to any surplus that may remain out of said sale after paying said debt and costs, and the expenses of the referee in selling and conveying said mortgaged premises to the purchaser; and the said court ordered judgment accordingly. From the judgment so entered, the defendant appealed.

J. H. McDonald, for the appellant.

I. The bond and mortgage in suit were given to secure part of the purchase money on a sale of the real estate of William P. McCarthy and others, infants, ordered to be sold by the county court of Monroe county; and were part of the proceeds of the real estate so sold. The proceeds of the real estate so sold are to be deemed real estate of the same nature and character as the property sold. (3 *R. S.* 276, § 110, 5th ed. 1 *Duer*, 286.) This is the character and nature of the proceeds, during the minority of the infants. The object of the statute was to preserve, during the infants' minority, the character of the property in reference to the statutes regulating descents and distributions. (11 *N. Y.* 544. 3 *Sandf. Ch.* 456-464.) Now, if this doctrine be true, how can the special guardian, appointed only for the purpose of making the sale; or, even

Tuttle v. Heavy.

the general guardian of the infants, at his own volition or option, change the nature or character of these proceeds, and so to divest them of that character which the law has impressed upon them? If he can, then every guardian can make a statute for his own government in the management of his ward's estate, and very much to the detriment of contingent heirs, provided the ward should die before attaining his majority. Suppose that the infants interested in this bond and mortgage had died before attaining their majority, then what would become of the bond and mortgage? Assuredly, if no valid disposition or sale of it had been made, it would descend as real estate to the heirs at law. If the disposition now made of the bond and mortgage is held to be valid, it certainly defeats the object of the statute, and renders the latter a dead letter, and of no force or effect whatever.

II. The general guardian, as such, had no right whatever to this bond and mortgage, except so far as to receive the interest accruing thereon. He had not given security on real estate, nor is there any evidence showing that he gave any security, except his mere personal bond or obligation. (*Laws 1848, p. 407, § 8. Sup. Court Rules, 70, 71. 1 John. Ch. 561.*) The only evidence of any security having been given is the records of the surrogate, showing that McCarthy, on being appointed general guardian, filed his bond, as such. This bond and mortgage was not personal property such as the general guardian had power to dispose of without order or authority.

III. If the above propositions are true, then it is necessary, before the guardian can sell or dispose of this property, that he first obtain authority; and the only source of authority for such purposes is the Supreme Court. The county court has no jurisdiction whatever, except as provided by statute; and the statute confers no power on the latter court to interfere in any way with the proceeds of such sales, except to direct their investment. (*Code, § 30,*

Tuttle v. Heavy.

subd. 6. 1 Lansing, 90.) It follows, therefore, that the order made by the special county judge is absolutely void, and of no force or effect whatever. He had no jurisdiction to make such order, either as special county judge, county judge, or as holding a term of the county court. The jurisdiction of the special county judge is limited and special. The statute creating the office clearly and fully defines its powers. (*Laws of 1864, ch. 368, p. 860.*) But admitting, for the sake of the argument, that acting in the capacity of county judge, holding term, he had power to make such an order, still he could not legally make it, if the county judge was within the county, and in no way incapacitated. Hence the offer made by the defendant was competent, and should have been allowed.

IV. If there was no valid order directing the sale and transfer of this bond and mortgage, then I contend that the Supreme Court could not, by *ex parte* order, confirm such sale or transfer, or authorize the entry of any order having the effect of rendering valid and legal that which was before a perfect and absolute nullity. This is the very thing sought to be done in this case by the order of confirmation. We see that the order of the special county judge is absolutely void, and no title could or did pass to the plaintiff by virtue of it. Then how could the Supreme Court confirm this proceeding?

I admit the latter court has power, in all cases of infants' estates, their sale and disposition, the disposal and investment of the proceeds, &c.; but I submit that even that court has no inherent jurisdiction, and none unless the facts conferring it are properly before it, and only then to the extent provided by statute. (6 *Hill*, 416. 4 *N. Y.* 257. 10 *Barb.* 555.) It cannot be contended that any jurisdictional facts were before the Supreme Court when the order of confirmation was made. This order was based solely on the petition. If there were any reasons existing why the sale of the bond and mortgage should be

Tuttle v. Heavy.

made, none whatever appeared. There was nothing in fact, before the court, except the statement contained in the petition last referred to; and of course that contained no fact upon which the court could act. The statute requires that the facts and circumstances which render a sale necessary and proper shall be before the court before any order can be had in the premises. (2 R. S. 195, § 175. 1 *Hopk. Ch.* 122.) This not being done, and no jurisdictional facts appearing before the court, the order confirming the sale of the bond and mortgage was void, and hence gave no title to the plaintiff. Therefore, the plaintiff having no title, could not foreclose the bond and mortgage, or maintain any action upon either against the defendant.

V. The court erred in refusing to grant the motion for a nonsuit to the plaintiff, and dismiss his complaint; and also erred in its findings of fact and conclusions of law.

Edward Webster, for the respondent.

The money is shown in the whole case to be due and owing, and the only real question on appeal is as to whether the plaintiff is the owner of the bond and mortgage, and entitled to recover.

I. A mortgage, both at law and in equity, is a mere security for the payment of money. The mortgagee has but a chattel interest, which will pass by delivery, even without writing. (*Wilson v. Troup*, 2 Cowen, 231. *King v. Merchants' Exchange Co.*, 5 N. Y. 547. 4 Abb. Dig. 55, § 120.) The mortgage, on its face, was made payable to the mortgagee and his assigns; and hence gave authority *per se* for assignment and sale. No order of any court was necessary for its transfer, except for the purpose of protecting the guardian and his sureties, as against the infants; and is of no consequence in any event to any other party. The interest of the infants themselves is in the money secured to be paid by the mortgage; and it makes no difference to them, whether it comes to the hands of

 Tuttle v. Heavy.

their guardian from the mortgagor, or from an assignee of the mortgage. The infants can make no objection to the source of its receipt, and *a fortiori* as to third persons. The mortgagor owes, and is bound to pay, to the "mortgagee or his assigns;" and the special guardian and his sureties are responsible to the infants for any waste of the estate. The question, therefore, by the defendant's counsel, as to how much the plaintiff paid for the bond and mortgage, is impertinent, and the answer, in which the defendant can have no interest, was properly excluded. The bond, mortgage and assignment, were necessary documentary evidence in any aspect of the case, and the objection to their admission properly overruled. The remaining documentary evidence, (if the foregoing views are correct,) is mere surplusage, and its admissibility can therefore hurt nobody. Where harmless evidence is introduced, and it cannot by a legal possibility affect the verdict, the error may be disregarded. (4 *Abb. Dig.*, tit. *New Trial*, § 158, and cases cited.)

II. The impress of reality on the proceeds of sale of an infant's real estate is merely to protect the rights of his legal representatives; and deprive him (the infant) of the power of testamentary disposition under age, and for no other purpose. (2 *R. S.*, *marg. p.* 195, § 180. *Forman v. Marsh*, 11 *N. Y.* 548.) The impression of reality is on the money secured to be paid by the mortgage, and not on the mortgage itself; and hence attaches to the money received from the assignee, but does not follow the instrument into his hands. So far as the infants are concerned, the bond and mortgage have performed their office; and the plaintiff holds them as security for the repayment of his money. 1. The county court is a court of limited jurisdiction, but it has full chancery powers so far as that jurisdiction extends; and among these powers is jurisdiction over the sale of infants' real estate situated within the county, (*Code*, § 30, *subd. 6*; 2 *R. S. marg. p.* 194, *et seq.*)

Tuttle v. Heavy.

and the court, having acquired jurisdiction, has the necessary powers over the persons and the subject matter of the action, carrying with it as a consequence, the power to direct a transfer and assignment of the security, and an accounting for the proceeds. (2 *B. S. marg.* p. 195, § 179. *Pardee v. Van Anken*, 3 *Barb.* 534.) The county court had authority therefore to direct the assignment and transfer of the security, and the objection to the order was properly overruled. That order was an order of the court—not of a judge—and cannot be inquired into or impeached collaterally. In a proceeding on behalf of the infants directly to vacate the order, or for other relief, only, can its validity be questioned. (*Cole v. Stafford*, 1 *Caines*, 249. *Hoyt v. Gelston*, 13 *John.* 139.) The offer to prove that the county judge was in the county, &c., on the part of the defendant, was properly excluded, and the order of the county court being valid, the order of confirmation is mere surplusage, and could injure no one.

III. It is an undeniable proposition that the Supreme Court, as a chancery court, has general jurisdiction over the estate of infants. It can change real estate into personal, and *vice versa*, and can order a sale or transfer of the securities in the hands of a special guardian. (*Mills v. Dennis*, 3 *John. Ch.* 370, and cases cited. 3 *Abb. Dig.*, tit. *Infant*, 344.) The court can confirm an unauthorized assignment and transfer of the securities made by the special guardian in good faith; and an order entered *nunc pro tunc* will cure the defect and promote the ends of justice. The defendant has no cause to complain of such an order, or of leave granted to plead it in a supplemental complaint, on notice, since all his costs have been paid, and the parties to all intents and purposes stand before the court as in a new action. The order of the Supreme Court was not a confirmation of the county court order, but a confirmation, *nunc pro tunc*, of the assignment and sale. All

Tuttle v. Heavy.

other matter in the order is mere recital for the information of parties, and not of the essence of the order itself.

IV. The defendant's position is untenable, both in equity and law. More than half the money on the mortgage had been paid to the guardian before the assignment, and two payments of interest to the plaintiff, since that date; and the balance was all due and payable before the commencement of the action. If the mortgage had not been assigned and the defendant had fulfilled his obligations, all the money would have been paid by him into the hands of the guardian. Why then does he not bring the money into court and offer to pay his just and honest debt to whom it may concern, instead of standing on the defensive, and refusing payment at all? The guardian has received his money on the bond and mortgage from the plaintiff, and he and his bail are responsible for it to the infants. Let the defendant then pay his debt by refunding it to the plaintiff. No one will deny the power of the Supreme Court to deal with the person and estate of infants, and to protect their rights. (*In Re Fris, 2 Paige, 374. Wilcox v. Wilcox, 14 N. Y. 575.*) The decree of that tribunal will also protect the defendant. Why then should he resist the payment of his debt by voluntarily appearing as champion for the infants, instead of setting himself right before the court by bringing in for its disposition the money which he has long since unjustly refused to pay?

By the Court, JOHNSON, J. There is no merit in this appeal. The only question raised by the pleadings, or upon the trial, was in respect to the plaintiff's title to the bond and mortgage by means of the assignment.

The precise question was decided in *Field v. Schieffelin, (7 John. Ch. 150.)* That was the case of an assignment of a bond and mortgage by a guardian, before any payments had been made upon them, and before they had become due. And it was held that the guardian had the

Fuller v. Rowe.

right to sell the choses in action, and personal property of his ward, and convert them into money, and could give the purchaser a perfect title thereto by such sale and assignment. It was further held, in that case, that even the ward could not question the validity of the sale and the title of the assignee, or prevent the payment of the money to him on the bond and mortgage; unless he could show fraud and collusion between the guardian and the assignee, against him or to his prejudice. The case is on all fours with this, except, that in this case there is no question of any collusion.

No order from any court was necessary, to enable the guardian to make the assignment, or to establish its validity.

The judgment of the special term must therefore be affirmed, with costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, May 1, 1871. *Mullin*, P. J., and *Johnson and Talcott*, Justices.]

FULLER vs. ROWE, impleaded, &c.

An incoming partner, who becomes a member of the firm after a contract has been made by it with an individual, for work and labor to be done by him as superintendent, and performance has been commenced under it, is liable to the employee for the work and labor performed by the latter after such new partner becomes a member of the firm, and is elected and takes upon himself the duties of its chief managing and executive officer.

If the company is dissolved, and abandons its work, before the period for which the employee was hired expires, this gives the latter the right to bring his action for work and labor, the same as though no special contract had ever been made.

But he cannot be made liable for that portion of the indebtedness which accrued before he came into the firm, except by his own act or agreement founded upon a sufficient consideration.

Merely becoming a member of the firm is not sufficient, and raises no legal presumption against him. His promise or agreement, to pay previous debts of the firm, cannot be inferred from that circumstance alone.

Fuller v. Rowe.

The question, in such a case, is whether the incoming partner has assumed the old indebtedness. And this is a question of fact, or a mixed question of fact and of law, but not of law merely. If the referee fails to find that fact, no recovery can be had.

A PPEAL from a judgment entered upon the report of a referee.

In February, 1866, the plaintiff was engaged by one Sweet, who assumed to be acting as president of a company styled "The Central City Coal Co.," to superintend the mining operations of the company, in Pennsylvania, for the term of one year, at the salary of \$1800. The plaintiff was to commence his services on the 1st day of March thereafter, and did so commence, continuing his services until November following. The Central City Coal Co. never had any existence in fact, as a corporation. In April the defendant, Rowe, was elected president of the so-called company. After Rowe's election he assumed the duties of president, and the plaintiff acted under his instructions until the company suspended operations for want of funds. In addition to the services rendered by the plaintiff, he advanced moneys for the payment of laborers and expenses at the mines, which money was so advanced after Rowe assumed to be president. The plaintiff found serious obstacles in the progress of the work; the vein of coal which was being worked having cropped out, giving rise to serious question as to the feasibility of continuing operations. He then writes to Rowe, leaving it to him to abandon the work or proceed. He writes, "I am subject entirely to your orders." It was concluded to proceed with the works. Funds finally gave out, and in September a meeting was called to raise funds to pay off all who were employed on the works. Rowe presided, and paid in \$1200, pursuant to the resolution of this meeting. The services of the plaintiff were found to be reasonably worth \$150 per month.

The action was referred to a referee, who found the

Fuller v. Rowe.

facts substantially as above stated. He found also the following conclusions of law :

1st. The organization of the Central City Coal Company never having been perfected, the company, as such, was under no corporate liability to the plaintiff, and he had no remedy by action against the association attempted to be organized by that name, in its aggregate or corporate capacity.

2d. That where an organization is so defective as not to be liable as such to those outside of its association, with whom it attempts and professes to deal, and with whom contracts are made, then those members of the attempted organization, who acting in its name and clothed with an actual or assumed official capacity enter into contracts for service or employment and deal with the persons thus employed ; and those who by their acts and contracts official and otherwise have recognized and adopted such contracts and the employment of parties thereunder, stand in the position of partners, as to the persons with whom they thus deal, and are liable as such.

3d. That it followed from the facts as they exist, and were found, that the defendants Sweet, Hills and Rowe, were jointly liable to the plaintiff for the services rendered and the moneys advanced by him, and that he was entitled to a judgment for the amount before stated to be due to him.

4th. That the defendants Barnes and Gifford not having been engaged in any official capacity in the attempted organization, nor entered into any contract with the plaintiff, or recognized or adopted the contract or employment of the plaintiff thereunder, could not be held to any liability as partners, and were not in that, or in any other capacity, responsible to him in this action.

Judgment was accordingly ordered against the defendants Sweet, Hills and Rowe, or such of them as had been served with process or had appeared in the suit, for the

Fuller v. Rowe.

sum of \$1435.31, with costs to be taxed; and in favor of the defendants Barnes and Gifford, that the complaint be dismissed, with costs in their favor to be taxed.

From the judgment so entered the defendant Rowe appealed.

D. Pratt, for the appellant.

I. It is conceded that the parties interested in this coal company, especially those who took an active part in its operations, are liable as partners, upon all contracts entered into on behalf of the company, in which they were thus interested. 1. Although they may have supposed that they were simply acting as officers of an incorporated company, yet it was the business of those who assumed to be officers to know whether the company was incorporated or not. 2. It is not, therefore, denied that Rowe would be personally liable upon contracts made in the ordinary course of business of the company, after he became connected with it. (*Wells v. Gates*, 18 Barb. 554.)

II. But it is equally clear that he would not be liable for the non-performance of a contract made before he had any interest in the company, and which he has never in any manner assumed to perform. 1. The joint interest or joint liability, must be contemporaneous with the formation of the contract itself, in order to superinduce a corresponding liability to perform. (*Story on Part.* § 146, *g.c. Gow. on Part.* pp. 151, 152. *Collyer on Part.* bk. 3, ch. 3, § 22. *Vere v. Ashby*, 10 Barn. & Cress. 288. *Young v. Heuster*, 4 Taunt. 282. *McGuire v. O'Hallaran*, Hill & Denio, 85. *Sloan v. Van Wyck*, 47 Barb. 634.) A completed contract between two parties, is binding only on the parties to it. If a new party becomes interested in the subject matter, he will not, for that reason, become bound by its stipulations, but can only be bound by some new agreement upon some new consideration. (*Same cases.*) Even where he admits his liability, he will not be bound unless

Fuller v. Rowe.

he was originally a party to the contract, or interested in it. 2. If a new party becomes interested, and before a full performance of the contract, it would undoubtedly be competent to cancel the old contract, and enter into a new one binding the new party. It was upon this principle that the case of *Sloan v. Van Wyck* was decided. The rule laid down by Judge MULLIN, in his dissenting opinion, "that there was no rule of law that would authorize a recovery against a person not originally a party to such contract," was not questioned by the majority of the court. The majority held that the effect of the transaction was, that the original contract was rescinded, and a new contract made, to which the person sought to be charged was a party. 3. In this case, it is expressly found by the referee, that when the contract was made between Sweet and the plaintiff, Rowe was not a party to, and had no interest in it; that it was not afterwards rescinded, nor was any new one made, but that the plaintiff performed his entire work under and in pursuance of the original contract. It comes, therefore, within the express words of Justice Bronson, in the case of *McGuire v. O'Hallaran*, (*supra*.) In that case he says: "If the party was hired for a year by one of the defendants, before there was any joint interest between them, and rendered the services under that retainer, then there was no contract either express or implied, between him and the defendants jointly." 4. In this case Rowe was held liable for work done before he became interested at all, some two and a half months. Surely there can be no pretense that he is liable for that time.

III. The referee clearly erred in holding Rowe liable, while he held Gifford and Barnes not liable.

Wm. J. Wallace, for the respondent.

The defendant Rowe, and the other parties who held themselves out as responsible for the transactions of the

Central City Coal Co., are liable as partners for the services rendered to them by the plaintiff.

I. Personal responsibility on the part of individuals constituting an association of any kind, to the full extent of the indebtedness of the association to third parties, can only be avoided by their becoming a corporation or association sanctioned by special or general statute. Companies or associations not so sanctioned, are but ordinary partnerships, and the law respecting them is the same. (18 Barb. 554. *Doubleday v. Muskett*, 7 Bing. 110, 115.)

1. Such liability is not avoided by the fact that the services were rendered under a contract entered into before the defendant became a member of the association, when the association received the substantial benefit of the contract after the defendant became a member, and the defendant was personally cognizant that the services were being performed. (2 Car. & P. 409. 49 Barb. 634.) 2. An incoming partner is liable for the debts of the old firm, upon proof of slight facts showing a recognition of the indebtedness. (*Story on Part.* §§ 152, 368.) Slight circumstances will authorize an inference that a partnership has adopted as a joint debt what was originally the separate debt of one partner. (*Buck*, 16, 174. 6 Vesey, Jr. 604. 8 id. 503.) In the language of Lord Thurlow, "If they have in any way considered the debt as a joint debt, I will understand it so, for a very little matter respecting those debts will make both liable." (1 Vesey, Jr. 131.)

II. The defendant Rowe is liable as a principal who has adopted the acts of an agent. Sweet contracted for the services of the plaintiff in behalf of a corporation, and to be rendered to a corporation, for the term of one year. They were to be paid for at the end of the year. The corporation could only receive the benefit of the services, direct their performance and pay for them through its officers for the time being. By necessary implication, therefore, Sweet assumed to act for all who might, during

Fuller v. Rowe.

the year, manage the affairs of the corporation. When the defendant became an officer of the corporation, he became one of the principals for whom Sweet had assumed to act, and he accepted the services and recognized the employment of the plaintiff. The principal thus adopted the action of Sweet. There is no objection to the defendant's liability on this theory, from the fact that Sweet was not his agent at the time of employing the plaintiff. To bind a party by ratification it is not necessary that any relation of agency should have existed between the parties previous to the ratification. The effect of the ratification is equivalent to a previous authority. (*Culver v. Ashley*, 19 Pick. 300, 304. *Finney v. Fairhaven Ins. Co.*, 5 Metc. 192.) It is true that Rowe assumed to be acting for the Central City Coal Co., in adopting Sweet's contract, but as he had no such official character, he is individually liable. (*See cases cited under 1st point*).

III. The defendant is liable to the plaintiff upon an implied contract to pay what the plaintiff's services were reasonably worth, and to pay the moneys advanced by the plaintiff in July, 1866; and in this view of the case, the agreement made with Sweet is of but little pertinency.

1. The agreement made by the plaintiff with the Central City Coal Company through Sweet lacked one of the essentials requisite to every contract, viz., two contracting parties. There being no such person *in esse* as the Central City Coal Company, there was no contract, and what was called an agreement was a nullity, because there was but one party to it, to wit, the plaintiff.
2. There being no express contract, the defendant and all those who accepted and received the plaintiff's services and money, are liable therefor upon an implied promise.
3. Upon this theory of the case, the defendant is liable for the full amount of the recovery, as follows: The plaintiff received \$346 from the Central City Coal Company, and this should be applied to discharge the sum first becoming due for his services.

Fuller v. Rowe.

This would pay him up to the time when his services commenced under the defendant's instructions, and the defendant should be allowed any excess that might remain in the plaintiff's hands. Adding the amount of the plaintiff's advances to the sum unpaid for his services, and the same result is reached as is found by the referee. 4. It is true that the referee adopted another theory, but if the judgment is right upon any theory, it should be affirmed.

By the Court, JOHNSON, J. Upon the facts found, the "Central City Coal Company," in whose service the plaintiff engaged as superintendent, was never incorporated, but was, at the time of the plaintiff's employment, and continued through his term of service, to be, a mere association of individuals transacting business under that name. They were, in fact and in law, mere partners, and the case must be determined by the rules applicable to partnerships.

The defendant was what is termed an incoming partner, after the plaintiff had made his contract and commenced performing on his part. According to the other facts found by the referee in settling the case, not contained in the report, the defendant had no connection whatever with the company until after the plaintiff had been engaged in the performance of his contract for a period of two and a half months. The plaintiff continued in the employment of the company, under the original agreement, for a period of eight months, when the company disbanded, and suspended operations, and the plaintiff was thrown out of employment. The defendant is, beyond all doubt, liable to the plaintiff for the work and labor performed by him for the five and half months after he became a member of the company, and was elected and took upon himself the duties of its chief managing and executive officer.

The action is to recover the value of the work and

Fuller v. Rowe.

labor. This is the only action which could have been brought, for this purpose, as the original contract was never performed. The company dissolved and abandoned the work before the year for which the plaintiff was hired had expired. This gave the plaintiff the right to bring his action for his work and labor, the same as though no special contract had ever been made.

Had the action been upon the contract, to recover damages for a breach by the defendants, it probably could not have been maintained against the defendant, within the decided cases, as he was not a party to it originally, and is not shown to have become so, otherwise than by becoming a member of the partnership after the contract was made, and performance had been commenced by the plaintiff, under it. But that question is out of the way here. The only question here, upon the merits, is whether the defendant is liable to the plaintiff for his work and labor for the entire period of his services—eight months. Before the defendant came in, the value of the plaintiff's services was a debt and charge against the previous partners, with which the defendant had nothing to do. He could not be made liable for that portion of the indebtedness, except by his own act or agreement, founded upon a sufficient consideration. Merely becoming a member of the firm, is not sufficient, and raises no legal presumption against him. His promise or agreement to pay previous debts of the firm cannot be inferred from that circumstance alone. The question, in such a case, is whether the incoming partner has assumed the old indebtedness. This is a question of fact, or perhaps a mixed question of fact and of law. But it is not a question of law, merely. The true rule on this subject, and which is supported by nearly all the adjudged cases, is laid down by *Parsons* in his work on *Partnership*, 434, 435 and 436. (*Ayrault v. Chamberlin*, 26 Barb. 83, 88.)

The difficulty in the case now is, that the referee has

Fuller v. Rowe.

not found that there was ever any agreement on the part of the defendant to pay this portion of the indebtedness, or any binding assumption of it in fact. On the contrary, he finds that the defendant "never promised or assumed to pay him (the plaintiff,) except as such promise or assumption may legally result from his acts after he became president of the so-called company." It appears affirmatively, therefore, from the case as settled, that the defendant was held liable upon the legal inference arising from his conduct and subsequent dealings with the plaintiff. If the referee had found the fact, from such conduct and dealings, and the other circumstances surrounding the transaction, of the promise or assumption, the legal inference would have been correct. But no such legal inference can be drawn from such facts and circumstances, until the conclusion of fact from them has been found. But it is certain that the conclusion of fact was not found. Such a fact may be found from other facts and circumstances attending the entire transaction, but the legal inference cannot be drawn from them, but must be drawn from the conclusion of fact, gathered and found from such collateral facts and circumstances. We might, perhaps, within the rule established by the Court of Appeals, have presumed that the referee had found this conclusion of fact in support of his decision on the legal questions, were it not that the case, as settled, shows expressly that no such conclusion had been found, and forbids such presumption.

It appears from the case, therefore, that the recovery, as against the defendant, is for two and a half months' services too much, which, at the rate allowed by the referee, would amount to \$375.

It is claimed by the plaintiff's counsel, that even if the plaintiff is not entitled, upon the facts found, to recover as against the defendant for this two and a half months'

Fuller v. Rowe.

services, still the payments which have been made should be applied upon the indebtedness for those services, that being the oldest debt. But the difficulty in respect to this is, that as the case stands, it was not the oldest debt, as to the defendant, or as to the company as it was constituted after the defendant came in. After that the money paid was the money of the partnership as then constituted, and could not be applied to the payment of the debts of a different partnership, without an express agreement that it might be so applied; or unless the defendant had in fact made himself jointly liable with the others for the payment of the older debt. In that case the law would so apply it, no particular application having been made by either party. The same difficulty, therefore, confronts us here as upon the other point. The fact is not found, and the referee has shown us that he did not deem it necessary that it should be found.

The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event; unless the plaintiff shall stipulate to deduct the said sum of \$375 from the amount of damages included in the judgment as of the day of the entry of judgment; in which case judgment is affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, May 1, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

GOULD and others' vs. CONWAY.

50 355
57h 538
59b 356
31ap430

In an action for goods sold and delivered, and to recover the balance of an account, day-books and books of original entries, not kept by the plaintiffs themselves, but by book-keepers employed for that purpose, and who did not make the sales charged by them, but only entered the sales reported to them by the salesmen, are not admissible in evidence for the purpose of proving the entries of sales, on proof of handwriting; which sales are not remembered by the persons making the same; and where the sale has not been proven, apart from the book.

Such books, as books of account, are incompetent witnesses for any purpose. Of themselves they can neither prove, nor tend to prove, anything. The entries being all made by third persons, are mere written statements of others—no better than hearsay.

Nor can such entries be properly received in evidence as original memoranda, to aid in establishing the defendant's indebtedness.

Yet it seems, that in such a case, if it appears that the salesman who reported a sale saw the charge made by the book-keeper, and knew, then, that it was correctly made, it may be introduced as a memorandum, in connection with the testimony of the salesman, either with or without the testimony of the book-keeper, the salesman having forgotten the fact that such sale was made by him.

There is no case, or rule of evidence, which holds that the books of account of a party are proper evidence to prove an indebtedness against another, where such books have not been kept by a clerk employed by him. *Per JOHNSON, J.*

APPEAL by the defendant from a judgment entered upon the report of a referee.

This action was brought by the plaintiffs to recover a balance claimed to be due them upon an account for goods sold and delivered by the plaintiffs, George Gould and James H. Gould, to the defendant, and by them assigned to the plaintiffs. The cause was referred to a referee, to hear, try and determine, who, after trial, reported in favor of the plaintiffs, upon which judgment was rendered against the defendant, and from that judgment the defendant appealed to this court.

The goods were sold to the defendant's family by the plaintiffs, George Gould and James H. Gould, under their firm name of Gould & Son, and were by them charged in

Gould v. Conway.

account to the defendant. Gould & Son had five or six clerks, one of whom acted as book-keeper, and the others as salesmen. When any goods were sold to the defendant or family, the clerk making the sale would report the same to the book-keeper, who would charge the defendant with the goods reported to have been sold, in the account books of Gould & Son. On the trial of the action before the referee, the plaintiffs called the clerks of Gould & Son as witnesses, to prove the sale and delivery of the goods charged in account to the defendant. As to many of the sales, the clerks making the same were unable to remember the transaction, or give any evidence in relation thereto. The plaintiffs then offered in evidence the account books of Gould & Son, claiming that the entries therein made by the book-keeper, of the sale and delivery of the goods to the defendant, were competent evidence. The defendant objected to the reception of the books in evidence, or the entries therein made. The referee overruled the objection, and received the books, and the entries therein made, as evidence. And he reported that there was due to the plaintiffs, from the defendant, the sum of \$148.50.

A. G. Wheeler, for the appellant.

I. The account books of Gould & Son, and the entries made therein, were not competent evidence. They were the mere declarations in writing of a third party.

II. The entries were not made by the parties who delivered the goods. They are entries of reports from other parties. Thus the written declarations of a third party are received in evidence to prove that the parol declarations of another third party are true.

III. Books of account of this character, and under these circumstances, were never admitted. (*Vosburg v. Thayer*, 12 *John*. 461.)

Gould v. Conway.

Geo. Truesdale, for the respondents.

The objection to the entries is to their competency, and that direct evidence had been given, tending to prove the sale and delivery of the goods. It appeared that the plaintiffs kept regular books of account, a book-keeper and several salesmen, who occasionally made entries in the absence of the book-keeper, and that entries of the account were made in the usual course of business. In regard to most of the items of the account, the witnesses had no recollection of the transaction, or only a partial and imperfect recollection, which was not refreshed by inspection of the entries. The person who made the entry was sworn to prove the handwriting and correctness of the entry, and the entry was then offered as an original memorandum of a transaction which the witness could not recollect. The entries were, then, the best and only means of proving the sales, and were competent; the book, as such, not being competent. (17 *How.* 399. 3 *Keyes*, 139. *Guy v. Mead*, 22 *N. Y.* 462. *Marcy v. Shultz*, 29 *id.* 346-351. *Halsey v. Sinsebaugh*, 15 *id.* 485. *Leland v. Cameron*, 31 *id.* 115-121.)

The witness having some indistinct recollection of parts of the occurrence, and the evidence tending to prove the same, does not exclude the memorandum. Failure to remember the delivery or price, or any fact material to make out a sale, makes it competent. To exclude it, it must appear that the witness had, or might have had, a distinct recollection of the sale and delivery. (*Russell v. Hudson River R. R. Co.*, 17 *N. Y.* 134-139. 1 *Greenl. Ev.* §§ 115-118.) The rule will admit an entry containing several items, any of which was not remembered by the witness. The offers of the day-books are the same in substance. The evidence was read under the latter only, which includes entries proved, when the witness could not testify to the sale and delivery from recollection. It is mere grouping of the entries after they had all been proved, instead of reading them one by one as proved; and their admissibility de-

Gould v. Conway.

pend on the proof, and not on the wording of the offer. Some entries read by mistake were offered to be withdrawn. There was no objection that they had not been proved. The objection to the books is irrelevant to the offer. The books were not offered as evidence of the account, but only to show original entries made by the witness, and to enable him to identify them. Nothing was read under this offer.

By the Court, JOHNSON, J. The only question of any importance in this case relates to the competency of books of account, and of entries therein, as evidence to establish the indebtedness of a party as there charged, against him. The books offered were day-books, and books of original entries, and were offered for the purpose, as the case states, "of proving the entries of sales where the handwriting is proved, and which are not remembered by the persons making the sale, and where the sale has not been proven, apart from the book." The evidence was objected to as incompetent for that purpose. The referee overruled the objection, and, as the case shows, "received the books in evidence, and the entries therein made, as evidence in the case for the plaintiffs." This ruling was excepted to by the defendant's counsel, and presents the only question in the case. The same question, substantially, was presented, in other forms, in the course of the trial, but the determination of this exception will be sufficient for all the others.

Under this decision the plaintiffs' day-books Nos. 1 and 2, were received in evidence in the plaintiffs' favor, and his counsel read therefrom charges against the defendant, therein contained, of about forty items, principally of boots and shoes, charged to have been delivered to the defendant or to some members of his family on his account. The books had not been kept by the plaintiffs, but by their

Gould v. Conway.

book-keepers employed for that purpose. Two or three different book-keepers had been employed during the time the account in question had been running, and the entries read had been made by at least three different book-keepers. According to the course of business in the plaintiffs' establishment, the book-keeper did not make the sales charged by him. The sales were made by other persons employed for that purpose, who reported them as they were made, to the book-keeper, and the latter entered the charges as reported by the salesmen.

Generally the book-keeper knew nothing in regard to the sale having been made, except what the salesman told him; and this was especially the case in regard to the accounts in question. The book-keeper, as a general rule, entered the initials of the salesman who reported the sale, with the charge, so that the salesman might be called upon in case any question should arise in regard to the charge. In regard to six of the entries, made at different times, no initials indicating by whom the sale had been made had been entered, and the book-keepers testified that all they knew about the sales, as charged, having been made, was what was reported to them by the salesmen, but that they made the entries correctly of the sales, as they were reported. Two charges, to which no initials of the salesman had been added, were shown to be in the handwriting of a clerk who was not present or examined as a witness, and whose whereabouts appears to have been unknown to the plaintiffs; and there was no proof whatever on the subject of the sale having been made, except the testimony of one of the plaintiffs, that *he thought* he "delivered the items there charged to one of the boys in the store for delivery," but that he could not tell which of their boys it was to whom he gave the articles for delivery.

The salesmen whose initials were added to the items charged were called as witnesses, and they testified, in regard to the account in question, that they had no recollec-

Gould v. Conway.

tion of the particular sale as entered, but that they never reported any sale that was not in fact made by them, or reported one differently from what it was actually made. In regard to the items to which no initials were attached, there was no proof that the sale had been made, other than that of one of the plaintiffs before referred to, in regard to two of them, except what the entries furnished. I have been thus particular in stating the case as it stood when the books were offered and received as evidence, for the purpose of presenting more clearly and distinctly the points on which the questions raised by the exception must turn. The books, as will be seen by the offer, and the ruling receiving them in evidence, were held to be competent and sufficient to complete the evidence and establish the fact that such sales had been made to the defendant, and that he was indebted to the plaintiffs to the extent indicated in the charges, or as tending to prove such indebtedness. Were they competent for that purpose, as the evidence then stood?

As books of account, merely, they were clearly not competent evidence of the truth or correctness of the charges therein contained, for the reason that they had not been kept by the plaintiffs, but by clerks in their employ. There is no case or rule of evidence, which holds that the books of account of a party are proper evidence to prove an indebtedness against another, where such books have not been kept by the party himself, but have been kept by a clerk employed by him.

As books of account, therefore, the books in question were incompetent witnesses for any purpose. Of themselves they could neither prove, nor tend to prove, anything. The entries were all made by third persons, and were mere written statements of others, no better than hearsay. As books of account, therefore, they were improperly received. But although they were offered and received in that form, it is apparent, I think, that the real object and

Gould v. Conway.

purpose for which they were offered and received, was as memoranda, merely, of the several entries of items therein contained, in the nature of original memoranda by the parties making them. This, I think, appears from the whole case, and if, under the evidence as the case then stood, the entries were competent evidence, as original memoranda, we should disregard the form of the offer and the ruling, for the purpose of determining the substance embraced in the exception. As memoranda, it is quite immaterial whether they are contained in books of account or on separate slips of paper. In either case it is the statement of a fact in writing, or purports to be so; and the rules of evidence governing its admissibility are well defined.

We are to see, therefore, whether these entries in these books could be properly received in evidence as original memoranda, to aid in establishing the defendant's indebtedness. I think no case can be found which goes the length necessary to support this ruling. I have examined all the cases cited, and many others, in our own State, and in English courts, and have been unable to find one which goes this length. They are all, or nearly all, cases where the witness who made the memorandum knew, at the time he made it, that the matter therein stated was true. In such a case it has been repeatedly held in this State, since the decision in *Merrill v. The Ithaca and Owego R. R. Co.*, (16 Wend. 586,) where the witness who made the memorandum was unable to recollect the facts contained in it at the trial, but was able to state that he knew the memorandum stated what was true when he made it, that the memorandum so made might be received, in connection with the oral testimony of the witness, as evidence of the facts therein stated. But here the witness making the memorandum had no knowledge of the fact, except what another told him, and the one who told him did not see the memorandum at the time it was made, and conse-

Gould v. Conway.

quently cannot state that he knew it was truly made at the time. It comes just to this, that the memorandum is used to prove that what another person told the one who made it was true. This is going a long stride beyond any adjudged case, and would be a most dangerous rule to adopt. It would be little short of hearsay upon hearsay. I am of the opinion that in a case of this kind, if it had appeared that the salesman who reported the sale had seen the charge made by the book-keeper and knew, then, that it was correctly made, it might be introduced as a memorandum, in connection with the testimony of the salesman, either with or without the testimony of the book-keeper, the salesman having forgotten the fact that such sale had been made by him. I do not find any decision going quite so far, but it seems to me that it falls within the principle of allowing memoranda of facts once known, and committed to writing but forgotten by one of the actors in the transaction, to be used in evidence to supplement his memory, or in the place of it. The question as to who made the memorandum is of much less importance than the question whether the person who saw it made, knew at the time, personally, that the fact existed and was there truly recorded. Of course if the witness did not make the memorandum, in such case, it should be clearly and unmistakeably identified by him as the identical one he saw made, or at least that he saw and understood it when the fact of which he then had personal knowledge was clearly within his recollection. But here the memorandum is quite too far removed from the transaction which it is sought to prove.

I think no one would claim that the book-keeper would be allowed to testify to what the salesman had told him in regard to a sale, where the salesman could only say that if he told the book-keeper so, it was true, but that he had forgotten both the fact, and the narration of it to the book-keeper. That is just what we have here; the

Gould v. Conway.

salesman, who alone knew the fact, if it existed, has forgotten both the sale, and the report of it to the book-keeper; all he can say is, that he reported sales truly, and none falsely.

Then comes the book-keeper, who can only say that the entry is in his handwriting, and that he knows he recorded accurately what the salesmen reported. So it all comes back upon the memorandum alone, to prove that the sale was made and the indebtedness incurred as the salesman said it was. This is quite too loose. But the ruling upon the trial goes even farther than this. The books, or the entries therein, were used as evidence of the correctness of charges which had the name of no salesman attached, and in regard to which there was no evidence other than the entry itself. The book-keeper did not pretend to know anything about the fact of the sale, and did not know even by whom it was reported. In regard to one of the items, he stated that it was "probably" reported to him by one of the plaintiffs, and that was all he could state. In regard to two items, which the books or entries were used to establish, there was no evidence, except that they were in the handwriting of a book-keeper who had gone away, and the testimony before referred to, of one of the plaintiffs, that at some time he had given similar articles to one of his boys in the store to deliver to the defendant.

My conclusion upon the whole case is, that the books, as such, were altogether incompetent, and that the evidence was wholly insufficient to authorize the entries in question therein, to be received or read in evidence as memoranda of the transactions to which they related.

The judgment must therefore be reversed, and a new trial granted, with costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, February 6, 1871.
McMillin, P. J., and *Johnson* and *Talcott*, Justices.]

CLEVELAND vs. BARROWS.

Causes of action for *deceit* in the sale of a canal boat and horses by the defendant to the plaintiff, and for *taking* certain *personal property* of the plaintiff's from such canal boat, and *converting* the same, may, under subdivision 8, of section 167 of the Code, be united in the same complaint.

Fraud is a wrong; and if a party thereby obtains from another, property, it is an injury to the property of such other, in the same sense, precisely, as though the wrongdoer had taken the property tortiously and converted it. *Per* JOHNSON, J.

Fraud belongs to the class of injuries denominated injuries to property. And such having been the established legal definition and classification of frauds, prior to the Code, it is to be presumed that it was intended to be, and was embraced in the classification of "injuries to property," in subdivision 8, of section 167 of the Code, when adopted by the legislature.

A PPEAL, by the defendant, from an order made at a special term overruling a demurrer to the amended complaint.

In such amended complaint, the plaintiff alleged that on the 12th day of October, 1869, at the city of Buffalo, the plaintiff purchased from the defendant, the canal boat "S. A. Tanner, of Montezuma," all her tow lines, tackle and apparel, with all her beds and bedding, and all her furniture, chairs, tables, &c., on board said boat, with four horses, with harnesses and full gearing for towing purposes, for \$1900. That at the time the plaintiff purchased said boat she was loaded with wheat, being filled upon the inside, and sunk deep down in the water, so that no examination could be made of the condition of the boat. That said horses and harnesses were all in the defendant's stable, and no examination was made of them. That during the negotiation for said purchase, at Buffalo, on the 12th day of October, aforesaid, the defendant represented to the plaintiff, that said canal boat had only been built five years; that at the time she was built he (said defendant) cut and got out the timber of which she was made, and knew her material and the manner in which she was built. That she was built of good oak timber;

Cleveland v. Barrows.

that she was perfectly free from decay, and never had been broken or injured in any particular or part; that she was good and sound in all respects, and in every part, as she was the day she came off the stocks. That the defendant stated and represented, during said negotiations, that said horses were all and each of them, good strong horses for towing, in good condition, and worth, altogether, \$300. That said plaintiff knew nothing of either said horses or said canal boat, except from the representations and statements made concerning them by the defendant. That the plaintiff believed said statements and representations of the defendant to be true, and trusted and relied on them exclusively, in making said purchase. That said representations were each and every one of them false and untrue, and the defendant well knew said representations to be false and untrue at the time he made the same, and the plaintiff was cheated and deceived by said false representations of the defendant. That in fact and truth, said boat was upwards of seven years old, and had suffered much from decay in all her timbers. That her parts had been broken and patched with bands of iron, and said boat was in a dilapidated and ruinous condition, and not worth \$900 at the time and place when said purchase was made. That said horses were poor, old and weak, and totally unfit for towing, and were not worth \$5, all of which was well known to the defendant at the time he made the statements and representations aforesaid. That said representations and statements of the defendant were fraudulently made, for the purpose, and with the intent of deceiving, cheating and defrauding the plaintiff, and said plaintiff was deceived, cheated and defrauded thereby, by reason of which he sustained damage to the amount of \$1000.

2d. For a further and separate cause of action against said defendant, the plaintiff alleged that said defendant did, on or about the 12th day of October aforesaid, wrong-

Cleveland v. Barrows.

fully and fraudulently take and carry away articles of furniture, beds, bedding, chairs, stoves, &c., from said boat, which belonged to, and was the property of the plaintiff; that the defendant did convert the same to his own use, whereby said plaintiff sustained damage to the amount of \$300. Wherefore the plaintiff demanded judgment against the defendant for \$1300, besides costs and disbursements. The defendant demurred to the complaint upon the ground that it appeared, upon the face thereof, that several causes of action had been improperly united therein, to wit: one being a cause of action for fraudulent representations in the sale of personal property; and another being for the wrongful taking, carrying away and converting other personal property.

The court, at special term, overruled the demurrer, and ordered judgment to be entered in favor of the plaintiff, thereon; with leave to the defendant to answer, upon terms.

The following opinion was delivered by the justice, at special term.

DANIELS, J. The demurrer to the complaint in this case, presents the point whether a cause of action for damages occasioned by fraudulent representations can properly be united with one for the unlawful conversion of personal property. By subdivision 3 of section 167 of the Code, several causes of action for injuries to property are allowed to be contained in the same complaint. The terms, injuries to property, were of well known legal signification at the time of the adoption of the Code of Procedure. They had then, and for many years previous to that time, acquired a technical and legal signification, and from the nature and object of the Code, must be presumed to have been used in that sense in that act. By the signification thus acquired, they included more than would be ordinarily and popularly understood by them; for, in a legal sense, they comprehended not only what strictly could be

Cleveland v. Barrows.

regarded as injuries to property, but beyond that, they included such injuries as the owner sustained in his rights of property. In that sense, injuries to property included causes of action for damages resulting from fraudulent misrepresentations, and they have been so regarded and classified by text writers. (1 *Hilliard on Torts*, 511. 2 *id.* 282.)

Section 179 of the Code was referred to, as indicating a different intention on the part of the legislature, but that section does not sustain that construction; for subdivision 4 of the section does not refer to actions of this character. That is confined to cases where the action may be brought to recover the debt, as a debt which may have been fraudulently contracted. In that case it provides that the defendant may be held to bail for the fraud, even though the action may be solely brought for the recovery of the debt contracted through its instrumentality. This section, properly considered, confirms the conclusion already mentioned, for it has only provided for the arrest of a party sued for the recovery of damages created by fraud, under the general designation of injuries to property. (*Subd.* 1, § 179.) That cause of action, in this instance, was properly united with the cause of action for the conversion of personal property. The plaintiff must, therefore, have judgment on the demurrer, with leave to the defendant to answer in twenty days, on payment of the costs of the demurrer.

De L. Stow, for the appellant.

I. No causes of action can be joined except as expressly provided in section 167 of the Code. In the case at bar, the joinder of the two causes of action is improperly made, unless it comes within the provisions of subdivision one of this section. The court below properly held that it does not. (*Anderson v. Hill*, 53 *Barb.* 246. *Sweet v. Ingerson*, 12 *How.* 332. *Flynn v. Bailey*, 50 *Barb.* 78.)

Cleveland v. Barrows.

II. The court below improperly held that such joinder was properly made under subdivision 3, section 167 of the Code, to wit: "Injuries with or without force to person or property, or either." This was manifestly error. The decision was based upon the assumption that at the time of the adoption of the Code, the term "injuries to property" had acquired a legal and technical signification, and was so used in that act, and in that sense included actions for damages for deceit in the sale of property. Prior to the adoption of the Code, text writers differed in their classification of actions for injuries; and although *Hillard, on Torts*, (a Massachusetts author,) sustains the opinion of the court below, the leading text writers of this State placed actions for deceit in a different class, to wit: "Injuries to the rights of property, or personal rights." And while laying down the rule that "injuries to personal rights, in their more extended sense, includes injuries to person and property," he classifies actions for deceit as "an injury to a mere personal right." (*Graham's Practice*, 84 to 90, 2d ed.) The classification here laid down is as follows: 1. Injuries to the person. 2. Injuries to personal rights. 3. Injuries to property. *Blackstone* classifies injuries as follows: 1. Such as affect the rights of persons. 2. Such as affect the rights of property. (3 *Com.* 119.) And this general classification was followed and adopted by an eminent authority on the practice prior to the Code. (1 *Burrill's Practice*, 29 to 33.)

III. The enactment of the Code abrogated the old forms of action, and at the same time did away with the old classifications, and the question must stand or fall by the practice as it now exists under the Code. The term "property" is therein expressly defined, to wit: "The word property, as used in this act, includes property real and personal." (*Code*, § 464.) "The words 'personal property,' as used in this act, includes money, goods, chattels, things in action, and evidences of debt." (*Code*,

 Cleveland v. Barrows.

§ 463.) The term "injury to property," as used in the Code, must be construed to mean a direct, corporeal damage or wrong done to specific property, and not to the mere personal rights, or "rights of property." (*Tracy v. Leland*, 2 Sandf. 729 to 731. *N. R. Co. v. Carpentier*, 13 How. 222.) By a fraud or deceit in the sale of property, no such injury is done either to "money, goods, chattels, things in action, or evidences of debt." This position is fully sustained by section 179 of the Code, which provides that "the defendant may be arrested, sub: 1. Where the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property. * * * Sub. 4. When the action is brought to recover damages for fraud or deceit." The court below evidently overlooked this portion of the section when it said, "this section (179) properly considered, confirms the conclusion already mentioned, for it has only provided for the arrest of a party sued for the recovery of damages created by fraud under the general designation of injuries to property. (Sub. 1, § 179.) Here a clear and marked distinction is made between, 1st. Injuries to property. 2d. The taking and converting of property. 3d. Deceit. Each cause being specifically mentioned; which clearly would not have been done had the legislature intended the term "injury to property" to include causes of action for either deceit or conversion. The intent of the legislature to exclude actions for deceit from the general division of "injuries to property," is evinced in the amendments of this section. (See § 154 of original Code, now § 179. Also amendments of 1849 and 1863.) Again, in section 53 of the Code the same distinction is maintained. This section provides: "Justices of the peace shall have civil jurisdiction in the following cases: * * Sub. 2. An action for damages for injury to rights pertaining to the person, or to personal or real property. * * Sub. 9. Actions for damages for fraud in the sale, purchase or exchange

Cleveland v. Barrows.

of personal property. See also section 46 of 1848, (now § 53,) and amendments of 1849, 1851, 1862, as evincing the intent above stated. The same distinction between actions for injuries to property, and injuries to personal rights, is found in section 91 of the Code, which provides for the time for the commencement of an action, to wit: "within six years." * * Sub. 4. An action for taking, detaining or injuring any goods or chattels. * * * Sub. 5. An action for criminal conversation, or for any other injury to the person or rights of another not arising on contract, and not hereinafter enumerated. All of the above sections clearly indicate that the legislature, in making use of the term "injuries to property," did not design to include therein actions for deceit. Actions for deceit can be regarded in no other light than as causes of action arising out of contract, based upon the old and well established principle "that fraud accompanied by damage gives a good cause of action;" and they have been so classified by text writers. See 1 *Burrill's Practice*, 32, 33, where deceit is classed among "injuries to the rights of property founded upon contract."

IV. The Code, section 179, provides that "no female shall be arrested in any action except for a willful injury to person, character or property." The term "willful" here means simply "designed" or "intentional." (2 *Bouv. Dic.* 656. *N. R. R. Co. v. Carpentier*, 13 *How.* 222.) The courts have construed the term "injury to property" to mean a corporeal damage to specific property. In *R. R. Co. v. Carpentier*, (13 *How.* 222,) the court held that "the identity of the property was destroyed." In *Tracy v. Leland*, (2 *Sandf.* 729 to 731,) this doctrine is more fully sustained. Here Justice Mason says: "The report," referring to 2 *Code Reporter*, 30, "if it means anything, means that the detaining of property is a willful injury to the estate or interest of the plaintiff in the property detained, and therefore subjects a female who detains it to arrest;

Cleveland v. Barrows.

thus giving an entirely different signification to the word 'property' from that evidently intended by the Code." And again: "It is difficult to understand how the mere detention or concealment of a piece of furniture is a willful injury to it. Had the defendant broken it to pieces or damaged it intentionally, so that its value was thereby lessened, that would be a willful injury, within the meaning of the act. But nothing of this kind is pretended. The plaintiff rests the right to arrest on the sole ground that a wrongful concealment and withholding of the property is in itself a willful injury. I cannot so understand it. The two things are in their nature entirely different, and the distinction between them is clearly stated in this very section, which authorizes an arrest, generally, where the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property." (*Tracy v. Leland, supra.*) It will here be remembered, that deceit is also distinctly stated in this section, (179,) sub. 4, as follows: "Or when the action is brought to recover damages for fraud or deceit." (*Crandell v. Bryan, 15 How. Pr. 48. Scudder v. Barnes, 16 id. 534. McGovern v. Payn, 32 Barb. 83.*) These cases hold that in an action for fraud, the defendant can only be arrested under subdivision 4. In *Wheeler v. Hartwell, (4 Bosw. 684,)* Bosworth, Ch. J., denied an application for the arrest of a female, holding "that the provisions of the Code, that 'no female shall be arrested in any action except for a willful injury to person, character or property,' (§ 179,) exempted the defendant from arrest, although she may have fraudulently contracted the debt in question."

V. The two causes of action united in the complaint are in their nature distinct and different, and the trial of each would require a distinct and different line of proof to sustain it; and on a verdict for the plaintiff, each would require a distinct and independent assessment of damages. Had these two causes of action been brought separately,

Cleveland v. Barrows.

it cannot for a moment be supposed that the court would have favorably entertained a motion on the part of the defendant for the consolidation of the same. (*Dunn v. Mason*, 7 *Hill*, 154. *Wilkinson v. Johnson*, 4 *id.* 46.) And the court should sustain a demurrer to a joinder of causes of action which is not clearly within the provisions of section 167 of the Code, in every instance where it would deny the defendant's motion to consolidate, had the causes of action been separately brought.

VI. The tendency of the decisions of the courts upon section 167 has been to restrict, rather than to enlarge, its operations. (*Sweet v. Ingerson*, 12 *How.* 331. *Lattin v. McCarty*, 17 *id.* 239, 241.)

For the reasons above stated, the decision of the court at special term should be reversed, and judgment rendered for the defendant, on the demurrer.

Box & Perkins, for the respondent:

Whether the two causes of action set forth in the complaint are properly united, is a question upon which we have been unable to find any decision bearing directly, but insist that the joinder of the two causes of action is allowed by the Code.

I. Section 167 of the Code is as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of, 1st. The same transaction, or transactions connected with the same subject of action. 2d. Contract, express or implied. 3d. Injuries, with or without force, to person or property, or either." * * The second count in the complaint, alleging the wrongful taking and carrying away of the plaintiff's personal property, is clearly injury to property with force, within the 3d subdivision of the above section. "Injuries to personal property are the unlawful taking and detention thereof from the owner," &c.

Cleveland v. Barrows.

(1 *Bouv. Law Dic.* 636.) Taking and carrying away wood that had been previously cut, is injury to property. (*Rodgers v. Rodgers*, 11 *Barb.* 595. See also 2 *Blackstone's Com.* bk. 3, p. 144.)

II. Property is the right or interest which one man has in things, to the exclusion of others." (1 *Hilliard on Torts*, p. 536, 2d ed.) "Property is the right and interest which one man has in lands and chattels, to the exclusion of others." (2 *Bouv. Law Dic.* 394.) Fraudulent misrepresentations, believed and relied on as true by the plaintiff, by which he was induced to part with a consideration, and did not receive, in things delivered in exchange for the consideration, the qualities represented by the defendant, and relied on by himself, has sustained an injury to his right to have the chattel with the qualities represented—an injury to his property. Such misrepresentations are included in the legal meaning of the words "injury to property." (1 *Hilliard on Torts*, 355, 2d ed.)

III. That portion of the 3d subdivision of the above section referring to injuries *without* force, to property, was expressly intended to include injuries occasioned by false representations, slander of title, &c.; or the words "without force" have no meaning in the section.

By the Court, JOHNSON, J. The complaint which is demurred to contains two counts or causes of action, one for deceit in the sale of a canal boat and horses by the defendant to the plaintiff, and the other for taking certain personal property of the plaintiffs from said boat and converting the same. The demurrer is that several causes of action have been improperly united.

The court at special term held that these two causes of action were properly united in the same complaint, under subdivision 3 of section 167 of the Code. Under that subdivision a plaintiff may unite in the same complaint causes of action arising out of "injuries with or without force, to

Cleveland v. Barrows.

person and property, or either." Neither of these causes of action is for an injury to the person of the plaintiff, and the question is whether they are both for injuries to property, within the meaning and intention of the Code. By section 464 of the Code, "the word property, as used in this act, includes property real and personal." Of course neither cause of action is for an injury to real property. By section 468 of the Code, the words "personal property," as used in this act, include money, goods, chattels, things in action and evidences of debt.

The cause of action for taking and converting the plaintiff's chattels is unquestionably for an injury to property as here defined, and as commonly understood. But how is it with the cause of action for the fraud or deceit in the bargain by which the plaintiff acquired his title to the boat? What property belonging to the plaintiff has that fraud injured?

By referring to the cause of action as stated in the complaint, it will be seen that it is there alleged that in consequence of the defendant's false and fraudulent statements and representations, the plaintiff was induced to pay, and did pay, \$1900 for the property which was not worth at the time over \$900. The presumption is, from the allegations in the complaint, that the plaintiff paid the purchase price in money. What he has paid, therefore, over and above the value of the property purchased, the defendant has obtained wrongfully, by means of his fraud. Fraud is a wrong, and if a party thereby obtains, from another, property, it is an injury to the property of such other, in the same sense, precisely, as though the wrongdoer had taken the property tortiously and converted it. The law affords the injured party the same remedy in either case. In both cases it is property wrongfully obtained. But more than this, fraud belongs to the class of injuries denominated injuries to property. It is so classified in *Hilliard on Torts*, a work of authority. Thus in vol. 1, 3d ed. 464,

Osborn v. Nelson.

chap. 17, it is said, injuries to property "include disseisin, trespass, nuisance, conversion, waste, and negligence;" and further, that "such injuries are redressed by the actions of ejectment, trespass, trover, case, and waste." And so in vol. 2, same ed. 137, chap. 26, treating of frauds, it is said, "another tort or wrong to property is fraud." Such having been the established legal definition and classification of frauds, before the Code, it will be presumed that it was intended to be, and was, embraced in the classification of "injuries to property," in sub. 3, of section 167 of the Code, when adopted by the legislature.

The demurrer was therefore properly overruled, and the order should be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, February 6, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

• • •

PHEBE A. OSBORN vs. JAMES NELSON and MARGARET H. NELSON.

Before this court will reverse an order of a county court granting a new trial on a case and exceptions, it must be made clearly to appear that the court below has committed some error of law.

Where a husband abandons his wife and family, ceases to provide them, and, so far as he can, renounces his marital relations, and goes to California, where he has ever since remained, this is equivalent to abjuring the realm, by a husband, at common law; so as to enable the wife to sue and be sued as a *feme sole*.

A claim for the services of her infant son, which has been assigned to her, is the separate estate of the wife, in such a case; and under our statutes for the better protection of the rights of married women, it is competent for her to maintain an action for the recovery thereof, in her own name.

Without any reference to the question whether the plaintiff in such an action is, under the circumstances, entitled to the services of her son, as her child and servant, the fact that she is assignee of the claim, is enough to enable her to maintain the action in her own name and right.

If it becomes necessary for the plaintiff to amend her complaint, in order that it may appear upon its face, more clearly and specifically, by whom the serv-

Osborn v. Nelson.

ice for which the action was brought was in fact performed, it may be amended upon the trial, or after the trial, to conform to the proof. Greater latitude of construction is always allowable in regard to pleadings in actions commenced in justices' courts than in actions commenced in courts of record.

APPEAL, by the defendants, from an order of a county court granting a new trial.

The action was brought in a justices' court of Cattaraugus county. The complaint, there, was for work and labor done by the plaintiff for the defendants, at their request. The defendants, by their answer, denied all the allegations of the complaint; and alleged that there was a misjoinder of defendants; Margaret H. Nelson being the wife of the defendant James Nelson, living and cohabiting with him. Also that all the claims and demands mentioned in the complaint had been fully paid and satisfied. The justice denied a motion for a nonsuit, and rendered a judgment against the defendants for \$25, with costs. The defendants appealed to the county court of Cattaraugus county, upon the following grounds, viz :

"1st. The justice erred in overruling the defendants' motion for a nonsuit, on the ground that the evidence shows the said defendant Margaret H. is a married woman, and the wife of the defendant James Nelson.

2d. On the ground that there is no proof that the service was contracted by, or performed for and at the request of, the said defendant Margaret H., or for the benefit or upon an express agreement by her to charge her separate estate therefor.

3d. On the ground that the court had no jurisdiction to render judgment against the said defendant Margaret H. so as to charge her separate estate or property, or personally against her.

4th. The plaintiff has failed to show any liability against the defendant Margaret H. Nelson.

5th. On the ground that the action is on contract, and

the plaintiff has failed to show a joint liability against this defendant with the defendant James Nelson.

6th. On the ground that the evidence shows the father of the said George Howland is still living and entitled to the earnings and service of the said George, and not the plaintiff.

The judgment is against the law and the evidence, and on the same grounds contained in the motion for a nonsuit. And this defendant claims the said judgment should have been more favorable to her in this, to wit, said judgment should have been in her favor, of no cause of action against the plaintiff, with costs of action."

On the case coming on for trial in the county court, the plaintiff objected to proceeding to trial, on the ground that the case had not been properly brought into this court, and the court had no jurisdiction, as the judgment was a joint judgment against both defendants, and they had, separately and by separate notices of appeal, appealed to this court. The court overruled the objection, and ordered the case to proceed to trial, and the plaintiff excepted. The plaintiff, to maintain her issues, was duly sworn as a witness in her own behalf, and testified as follows: "I am plaintiff; reside at Great Valley; have a son by the name of George Howland, aged twenty-one years; he has always lived with me, and I have always provided for him and supported and maintained him; in the year 1854, when George was but four or five years of age, his father Frederick Howland, abandoned me and my children, and he has never since lived with me, or provided anything for the support of myself or my son George; when he left, he went to California, and since has lived there or in some of the Western States."

The plaintiff then offered to prove that within the last two years, and while George was being supported and maintained by the plaintiff, and before he became twenty-one years of age, he, George, performed work and labor

Osborn v. Nelson.

for the defendants. The defendants objected. The court refused to admit the evidence, and the plaintiff excepted. The plaintiff then offered to prove that before the commencement of this action George Howland sold and transferred to this plaintiff an account for work and labor against the defendants, to which the defendants objected, and the court refused to admit the evidence, and the plaintiff excepted. The plaintiff then offered to amend her complaint, setting forth the assignment of the account by said George Howland to her. The defendants objected, and the court refused to permit the amendment, and the plaintiff excepted. No other proof was offered, and the court directed the jury to render a verdict of no cause of action. To which direction the plaintiff duly excepted. The jury found a verdict in favor of the defendants. A motion was then made by the plaintiff, for a new trial; and the same being granted, the defendants appealed to this court.

J. B. Finch, for the appellants.

I. The complaint is for work and labor done by the plaintiff for the defendants, at their request. The plaintiff failed to prove any cause of action against these defendants for work and labor done by the plaintiff.

II. The plaintiff's offer to amend her complaint by alleging and claiming for work and labor done by Geo. Howland, and assigned to her, was properly rejected by the court, for the reason that it changed the cause of action, and the court, on the trial, has no power to allow the amendment. (*Whitcomb v. Hungerford*, 42 Barb. 177. *Woodruff v. Dickie*, 31 How. 164.)

III. If the court had power to allow said amendment, on the trial, the refusing to allow such amendment is a matter in the discretion of the court, and such exercise of discretion is not the subject of an exception, and is not reversible on a motion for a new trial. (*Hendricks*

 Osborn v. Nelson.

v. *Decker*, 35 *Barb.* 298. 6 *id.* 208. 5 *Sandf.* 229. 21 *How.* 97. 24 *id.* 237.)

IV. The mother is not entitled to, nor can she recover for, the services of her minor children, while the father is living. And if a recovery was had by the mother, it would not be a bar to an action brought for the identical services by the child, by next friend, or an action by the father for the same services.

V. The father is entitled to the services of his minor children. The obligation of the father to provide for the maintenance of his child, entitles him to the custody of their persons, and to the value of their labor and services. (2 *Kent's Com.* 184.) The father is entitled to the wages of his son until he arrives at twenty-one years of age. (3 *E. D. Smith*, 305.) The father is bound to support his minor children, &c., but this obligation in such case does not extend to the mother. (2 *Kent's Com.* 182.)

VI. George Howland, the minor performing the services claimed, can recover for the same services, notwithstanding this action of the mother. The continued absence of the father, without supporting or controlling his son, has been held evidence of his consent that the son might labor for his own benefit. (3 *Barb.* 115.)

VII. The law fixes the liability of the father to support his minor children; the presumptions are, he is competent and has property, until the contrary is shown.

Hudson Ansley, for the respondent.

I. The action was by a married woman abandoned and deserted by her husband, to recover for the services of her minor child.

If a husband voluntarily and absolutely deserts his wife, and renounces, so far as he can, his marital relations, and leaves and continues absent from the State, the wife is considered as a *feme sole*. Such abandonment and absence

Osborn v. Nelson.

operates like an abjuration of the realm, at common law. (*Chapman v. Lemon*, 11 *How.* 235.)

II. At common law, an abjuration or banishment of the realm by the husband operates the same as his civil death, leaving the wife free to make contracts; to sue and be sued. (2 *Reeves' Dom. Rel.* 185, 186, notes. 2 *Kent's Com.* pp. 153, 154, 10th ed.)

III. A man who is civilly dead is unknown to the law. When a husband abandons his wife and children to their rights and obligations, he is not known. Although the care and custody of minor children primarily devolves upon the father, it depends upon the circumstances of the case. (*Williams v. Hutchinson*, 3 *Comst.* 312. *Reeves' Dom. Rel.* 448.)

IV. The parent or guardian who is bound to support an infant is entitled to their services and earnings. (*Williams v. Hutchinson*, 5 *Barb.* 122. *Wilcox v. Wilcox*, 48 *id.* 327.)

V. A mother, in case of the father's death, has the same right to the services of a minor child that the father would have if living. (*Gray v. Durland*, 50 *Barb.* 100.)

VI. The father is not entitled to the wages of a son, or to avoid his reasonable contracts, when he separates from the mother, and leaves the son under her care. (*Wodell v. Coggeshall*, 2 *Metc.* 89. 2 *Kent's Com.* 202, note a, 10th ed.)

By the Court, JOHNSON, J. This is an appeal from an order of the county court of Cattaraugus county, granting a new trial on a case and exceptions, on motion of the plaintiff. The action was commenced in a justice's court, where the plaintiff had a judgment. The defendants appealed to the county court, and on the trial in that court, at the close of the plaintiff's testimony, the jury were directed to find a verdict for the defendants. Afterwards, on a case and exceptions, the same court granted a new trial. We see no reason to interfere with the order grant-

ing a new trial to the plaintiff. Before this court will reverse such an order, it must be made clearly to appear that the court below has committed some error of law. No such error is shown. On the contrary, it appears to us that the new trial was very properly granted, in view of all that appeared and was offered to be proved by the plaintiff, on the trial. In any view of the case, as the evidence stood when the plaintiff rested, the action was properly brought by the plaintiff in her own name. Her husband, and the father of the minor son, for whose services the action was brought, had many years since abandoned the plaintiff and his family, and gone beyond the jurisdiction of the State, where he has ever since remained. He then ceased, wholly, to provide for his wife and family, and, so far as he could, renounced his marital relations. He did not go beyond the jurisdiction of the United States, it is true, but went to California and has never since returned to this State, or to his family. This has been held to be equivalent to abjuring the realm by a husband, at common law, so as to enable the wife to sue and be sued as a *feme sole*. (*Chapman v. Lemon*, 11 *How. Pr.* 235. *Abbot v. Bayley*, 6 *Pick.* 89. *Gregory v. Pierce*, 4 *Metc.* 478.)

The case comes fully within the reason of the common law rule, and the rule ought to be made applicable to such cases. There is the same necessity for the wife to act as a *feme sole* in obtaining credit, and acquiring property, for her personal support and protection, in such a case as this, as there was at common law where the husband had abjured the realm.

The plaintiff offered to prove the services, and that she had an assignment of the claim therefor from her son who performed the same. It is to be assumed, for the purposes of this appeal, that she could have proved, had she been permitted, the services and the assignment. This claim was, therefore, her separate estate. And, under

Osborn v. Nelson.

our statutes for the better protection of the rights of married women, it was competent for her to maintain an action for the recovery thereof, in her own name. Without any reference, therefore, to the question whether the plaintiff, under the circumstances, was entitled to the services of her minor son, as her child and servant, it was enough that she was assignee of the claim, to enable her to maintain the action in her own name and right. If it should become necessary for the plaintiff to amend her complaint in order that it may appear upon its face, more clearly and specifically, by whom the service for which the action was brought was in fact performed, there can be no difficulty in its being amended upon the trial, or after the trial, to conform to the proof.

Greater latitude of construction is always allowable in regard to pleadings in actions commenced in justices' courts, than in actions commenced in courts of record. There can probably be no question but that this service of the son was the labor and service intended to be set out in the complaint, so that the real cause of action would not be changed by the amendment. The difficulty at best could only be technical. The variance would not be deemed material, and would be wholly disregarded, unless it had *actually* misled the defendants to their prejudice, in making their defense upon the merits. (*Code*, §§ 169, 170.)

We are of the opinion, therefore, that the order granting a new trial should be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, March 6, 1871.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

RUGG vs. SPENCER.

Where an order made by a county judge requiring a judgment debtor to appear before a referee and answer on oath concerning his property, recites, expressly, that it had been made to appear before such judge, "by the affidavit" of one of the attorneys of the plaintiff, that judgment had been recovered in the action; that execution thereon, against the property of the defendant therein, had been duly issued; and that said judgment remained wholly unpaid, such recital is clearly sufficient, *prima facie*, to show that such proof had been made by a regular affidavit. It is a presumption which the law raises, in support of judicial authority and proceedings.

The order speaks for itself; and as all the necessary facts, to constitute it a regular and valid order, appear upon its face, it will be deemed to be such, until the contrary is made to appear.

The fact that no proof by affidavit was in fact made, before the county judge, when he issued the order, is not sufficiently shown, to rebut the *prima facie* proof of the recital in such order, by the production of a paper in the form of an affidavit, found on file in the office of the county clerk, reciting the facts as set forth in the order, signed by the plaintiff's attorney, but not sworn to, and having no jurat attached; although such paper has an indorsement upon it, purporting that it had been read on motion at chambers, before the county judge, and filed as of the same date as the order.

The mere presentation of such a paper, on the trial, without any evidence to show by whom the indorsement thereon was made, or how the paper came to be on file in the clerk's office, is no proof of any fact in the case, and does not tend, in any degree, to disprove the recital in the order.

In a proceeding before a county judge, under the chapter of the Revised Statutes relative "to proceedings as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions," (2 R. S. 584,) the judge found that the person proceeded against had been guilty of the misconduct charged, (failing to appear before a referee and be examined, in supplementary proceedings;) and he also found, as was recited in the order made thereon, that such misconduct and contempt was calculated to, and did, actually impair, impede, defeat and prejudice the rights of said plaintiff," &c.; and he was adjudged guilty of the contempt, and ordered to pay a fine, which it was expressly declared in the order, was imposed to indemnify the plaintiff in the action, not only for his costs and disbursements in that proceeding, but also "for the damage and loss sustained by said contempt, in the defeat of said proceeding." Held that the adjudication or order was sufficient in form, even though the preliminary recital might be somewhat defective in not stating, expressly, that it appeared that actual loss or injury had been sustained by the plaintiff in the action.

Held, also, that the adjudication or order would have been valid without any such preliminary recital; and as it expressly appeared in the body of the

Rugg v. Spencer.

order that the fine was imposed to indemnify the plaintiff in the judgment, "for damage and loss sustained, in defeating the supplementary proceedings, the inference was conclusive that it did so appear before the judge, and that he so found.

Such a recital, though a very proper formal part of an adjudication or order of that kind, is not a vital and necessary part; nor is it at all conclusive as to the facts which were made to appear before the officer, or that no other facts appeared.

It is sufficient, *prima facie*, for what is contained in the recital. But the recital is no evidence that nothing else was shown, or made to appear.

THIS was an action for false imprisonment, in causing the plaintiff to be imprisoned in the Cattaraugus county jail. The defendant justified under proceedings supplementary to execution, in which the plaintiff herein was, for a failure to appear before a referee and be examined under oath, in respect to his property, in pursuance of an order of the county judge directing him to do so, adjudged guilty of a contempt and fined, and ordered to stand committed until the fine should be paid.

On the trial, at the circuit, before Justice DANIELS and a jury, the defendant offered no proof. The plaintiff asked the court to hold and decide that the order of R. Lamb, county judge, dated January 4, 1868, was void, by reason of the order supplementary having been issued without authority; also, that the warrant of commitment was void as to the defendant; also to hold and decide that the county judge had no authority, on the papers, without other and further proof of actual loss by the judgment creditor, Spencer, than that contained in the affidavits and judgment roll, to impose a fine beyond \$250; also, to hold and decide that the adjudication of the county judge, dated January 10, 1868, was without jurisdiction, and void, having been made without legal or sufficient proof of actual loss; also to hold and decide that the affidavit of A. A. Bruce, bearing date December 26, 1867, was insufficient to prove a proper service of the order. Each of these requests was refused by the judge, and exception

Rugg v. Spencer.

taken. The court held that the affidavits and judgment were sufficient evidence of actual loss by the judgment creditor, to warrant the fine imposed by the judge upon the defendant, and the plaintiff duly excepted. Neither party desired any question of fact to be submitted to the jury, and the court thereupon nonsuited the plaintiff; to which ruling the plaintiff duly excepted.

The court ordered the exceptions taken to be heard in the first instance at general term.

H. Woodbury, for the plaintiff.

The records given in evidence on the trial show the order supplementary to execution to have been issued without proof on oath or affidavit, of the judgment, and issuing and return of execution unsatisfied. The county judge had no jurisdiction to issue such order without such proof. This question depends on the construction to be given to section 292 of the Code. The only authority upon which the ruling in this case was made was a decision made by the general term of this district in the early history of the Code, holding the party was entitled to the order as a matter of course. The court will not be embarrassed by such decision when others have been made of equal authority and better reason. The jeopardy to which the interest of any citizen would be exposed by such a practice is sufficient to condemn it. Power is given by section 298 of the Code to tie up the estate of a party by this order, which might have the effect to make him a bankrupt. Quite too serious consequences are visible for such a rule to meet the favor of the court. It is hard to discover the reason why it was intended to give this order without proof of a judgment, execution and return, when proof is required of all other orders in those extraordinary proceedings. How is this judge with limited jurisdiction to know there is such a judgment and

Rugg v. Spencer.

execution, if not informed by one of the ordinary modes of invoking the aid of such officers. The judgment was not in his court. The necessity of such an affidavit to obtain this order has been often held, directly or indirectly, ever since the adoption of the Code. (5 *How.* 446. 14 *Abb.* 251. 13 *id.* 418. 15 *id.* 475. 25 *How.* 85. 1 *Code R., N. S.*, 25, 91. 2 *Abb.* 457. 2 *Sand.* 765. 17 *How.* 157, 498. 25 *id.* 92.) In many of these cases the question was directly up. (5 *How.* 446. 18 *id.* 96. 1 *Code R., N. S.*, 25, 232. 10 *Barb.* 589. 30 *How.* 131.) The necessity of an affidavit cannot be regarded as an open question at this late day. In the old court of chancery, in proceedings on a creditor's bill, it was necessary for the recovery of the judgment, and the issuing and return of execution unsatisfied, to appear on the face of the bill, and to make proof of it on the trial. (16 *How.* 275. 8 *Paige*, 72.) In these proceedings the proof is required at the commencement. If it should be held the order supplementary was void, there was no contempt in disobeying the order dated January 4, 1868. The plaintiff was under no obligations to obey it. It was *coram non judice*. (5 *Hill*, 568. 7 *Abb.* 204. 14 *How.* 100. 13 *id.* 374.) The entire ground for issuing the second order was for a supposed contempt of what in fact was no contempt. There is nothing in the affidavits to call into exercise the judgment of the court, without which he had no right to issue the order. He could not at pleasure sit down and issue his mandate, and for a failure adjudge a citizen to jail because the defendant went his way to his merchandise. This is a case of jurisdiction, not of irregularity. (3 *Abb.* 301.) Making the second order was adding nullity to nullity. (23 *Barb.* 591, 601. 4 *Denio*, 118. 11 *John.* 175. 11 *Wend.* 648.) Suppose the affidavits had shown that the defendant in all things obeyed the order supplementary, would the judge have been justified in making the second

Rugg v. Spencer.

order? If he would not, what ground is there for the adjudication? The Code gives no power to punish for contempt until there is disobedience of a valid order. (*Sec.* 302.) In exercising the power, the Revised Statutes must be consulted. (13 *How.* 173. 2 *Sand.* 724. 1 *Duer*, 512, 519, 532. *N. Y. Stat. at Large*, vol. 2, p. 288. *Id.* p. 555, §§ 20-25.) The judge had no power without proof of actual loss or injury, to impose a fine beyond \$250. (17 *Barb.* 179. 3 *id.* 109.) The affidavits prove no actual loss or injury. They only prove a hindrance—a delay. The statute by requiring proof of actual loss does not mean delay or hindrance, but intended to give a remedy where the defendant had done something, or something had transpired to produce actual loss or injury to the party in collecting his demand. It is not sufficient to defeat, impair, impede or prejudice the proceedings supplementary. For all that, the offender becomes liable to be fined not exceeding \$250. This construction gives meaning to both sections. Section 21 was intended to supply a remedy to the party for a wrong where no other existed. It was not the intention of the law to authorize a court to impose an unlimited fine where the only offense of the party was a refusal to obey a process requiring his attendance before such court. Such power would be too liable to abuse. If a judge could impose \$417.58, he could impose \$100,000, if the judgment was sufficient. No such construction should be tolerated. How did the judge ascertain the plaintiff's loss was \$397.58? The judgment roll was not in his court; neither was it before him as one of the papers on which he was acting. No proof had been before him in any of the proceedings as to the amount of the judgment, except the statement in Bruce's affidavit, that the judgment was \$300. How did that prove a loss of over \$397? The proof before the judge, instead of proving actual loss, proved the judgment collectable, and there was noth-

Rugg v. Spencer.

ing tending to prove any loss or injury. The proof simply showed a disregard of the order, the only effect of which was to hinder the plaintiff's proceedings supplementary, and incurring the expenses of costs to the amount of \$20. How can it be made out by the papers that the plaintiff in the proceedings lost the whole of his judgment? Such a pretense is idle. The statute only authorizes a fine under section 21 to the extent of the actual loss or injury. The adjudication does not determine there was any actual loss or injury. The judge did not so find such determination, and finding is necessary to authorize the fine. (9 *Paige*, 378.) The proof shows the plaintiff was imprisoned by the direction of the defendant. (11 *Barb.* 642. 3 *Hill*, 523. 6 *Barb.* 79. 2 *Cowen*, 517.) The plaintiff proved the imprisonment, and the defendant, to escape liability, was bound to show jurisdiction in all the proceedings by which the plaintiff was imprisoned. (17 *Wend.* 32. 11 *John.* 444. 7 *Hill*, 35, 39. 1 *Denio*, 592, 595. 5 *Hill*, 242.)

There is another question in this case, which is worthy of consideration. The defendant in the proceedings was held for contempt in not appearing before the referee and submitting to an examination. That was an act which he was still able to perform, and those facts appeared before the judge. We say this particular case is provided for by section 23 of the statute referred to, which is imperative, and the judge was bound to exercise his power under that section. That his jurisdiction was limited to the power conferred upon him by the statute, and he was bound to pursue that strictly, which limited him to impose a fine sufficient to indemnify the plaintiff for his actual loss or injury, which were the expenses incurred by the supplementary proceedings, and imprison the defendant until such fine was paid, and until he should submit to an examination. All of which should have

Rugg v. Spencer.

been provided for in the adjudication and commitment. He had no jurisdiction to make any other adjudication.

Torrance & Allen, for the defendant.

I. One question presented by the case was this: Was it necessary to make proof, by affidavit, of the judgment, and the return of an execution unsatisfied thereon, before the county judge who issued the order for the defendant to appear and answer concerning his property, in order to give the judge jurisdiction to punish the defendant for a contempt for disobeying said order. The order was issued under subdivision 1st of section 192 of the Code of Procedure, which is, in substance, "that at any time after the return of an execution unsatisfied upon any judgment, &c., the judgment creditor is entitled to an order from the judge of the court, or a county judge, * * * requiring such judgment debtor to appear and answer concerning his property." Under this subdivision no proof is required to be made before the judge, to entitle the judgment creditor to the order. Subdivisions 2 and 4 of the same section expressly require proof by affidavit to be made to entitle the judgment creditor to the benefit of their provisions, respectively. Inasmuch as proof by affidavit is expressly required under these two last subdivisions, and is not so expressly required under the first subdivision, it is insisted that it was the manifest intention of the legislature not to require such proof in order to institute the proceedings provided for in the first subdivision. More than this, the first subdivision declares it to be the right of the judgment creditor, when the facts therein mentioned exist, to have the order granted. The language used is as explicit as could be employed for that purpose. It is that the judgment creditor is entitled, &c. This question is settled by the decision of the court at general term in this district, in the case of *Scott, receiver &c. v. Durfee*, not reported, the opinion in which was delivered by Justice

Rugg v. Spencer.

Marvin, at general term. (a) No decision in conflict with this has ever been made. It is a mere question of practice before the judge making the order, whether he will require proof under the first clause of section 292, as a prerequisite to the issuing of the order therein provided for. It is not a jurisdictional question.

(a) The opinion referred to was as follows :

By the Court, MARVIN, J. One of the questions presented was whether the plaintiff had been legally appointed receiver. The referee decided that he had not been duly appointed receiver, and that he therefore had no right or title, as receiver, to recover in the action.

A judgment was recovered against Samuel C. Durfee, in favor of George Knight; also another judgment, in favor of John Weirs; also another judgment, in favor of Jehial W. Edson. It was proved on the trial, that executions were duly issued, and returned unsatisfied. The judgments were rendered in justice's court, and transcripts had been filed in the county clerk's office, and the county clerk had issued the executions. The case contains a certified copy of the record of certain proceedings supplementary to execution. It contains a certified copy of the execution against Samuel C. Durfee, in favor of Weir, and another in favor of Knight, with returns made thereon. These were presented to the county judge, who thereupon made an order for Durfee to appear before him at, &c., to make discovery on oath concerning his property, &c., in each of the cases, dated March 18, 1857. The day for appearance was the 21st of March. The orders were served upon Durfee, the judgment debtor. March 21st the county judge made an order for the appointment of Allen D. Scott, receiver. The order is entitled, Cattaraugus County Court, "John Weir against Samuel C. Durfee;" and the like court, "George Knight against Samuel C. Durfee." It refers to the previous orders, and to the fact that the defendant had been examined before him, on oath, and then appoints Allen D. Scott receiver, and directing that such receiver, before entering upon the execution of his trust, "execute to the clerk of this court a bond, with sufficient sureties to be by me approved, &c., and that said Allen D. Scott, file such bond in the office of the clerk of Cattaraugus county; that the sum of \$9 be allowed to each of said plaintiffs for costs," &c. Scott executed a bond with sureties, dated March 21, 1857, and which was approved by the county judge. This bond is to "the clerk of the Supreme Court of the State of New York." Supplementary proceedings were subsequently had in favor of Edson, to which I shall presently advert.

Let us now inquire whether Scott was clothed with the powers of receiver, under the proceedings already noticed. The orders to appear and answer were not founded upon any affidavit. They were made upon certified copies of the executions issued, and returns made, by the sheriff. It is insisted by the defend-

Rugg v. Spencer.

II. Section 302 of the Code of Procedure provides that any person disobeying any order of the judge or referee, duly served, may be punished as for contempt. The plaintiff had no right to disobey the order, conceding that proof was necessary before the judge, and that none was made.

III. Before the order of January 10, 1868, convicting the defendant for a contempt, was made by the county

ant's counsel that there should have been evidence by affidavit or otherwise of all the facts specified in the statute authorizing this proceeding. It is not claimed by the counsel for the plaintiff that the executions, and returns indorsed thereon, were evidence of judgments, but the position is taken that no proof of any kind was necessary. That if the facts actually existed which authorized the proceedings, the judge had jurisdiction to make the order. This case was under the first provision of section 292 of the Code. It will be seen by reading it that nothing is said of an affidavit, or of proof of any kind. It provides for cases where an execution against the property of a judgment debtor, issued to the sheriff of the county, &c., is returned unsatisfied in whole or in part, and declares that the judgment creditor at any time after such return made, is entitled to an order from a judge of, &c., requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued.

In my opinion, the position of the plaintiff's counsel is correct. The statute does not require any proof of the facts which must have existed in order to justify the making of the order. If the fact specified in the statute existed, the judgment creditor was entitled to the order, and the judge had jurisdiction to issue it. Of course, in obtaining and proceeding upon the order, the creditor and the judge acted at their peril. Several cases were referred to, upon the argument, by the respective counsel, but most of them have little application to the question here presented. The cases arising upon certain provisions relating to the jurisdiction of justices' courts, in the Revised Statutes, as changed or modified by certain provisions in the act of 1831, to abolish imprisonment for debt, have been consulted. The question presented in some of those cases related to the construction to be given to certain provisions of the latter act. Thus by the Revised Statutes the first process in certain cases specified, was to be a summons returnable in not less than six, or more than twelve days. It was declared, however, that no person should be proceeded against by summons out of the county in which he resided. If the defendant was a non-resident of the county, the justice, upon application, was to issue a warrant. In such a case an affidavit was necessary.

By the act of 1831 arrests in certain cases were prohibited, and no warrant could be issued against a defendant in a case where an execution on the judg-

Rugg v. Spencer.

judge, the said judge had, on the 4th of January, granted an order for the defendant to show cause before him, at his chambers in Ellicottville, Cattaraugus county, on the 10th day of January, 1868, at 2 P. M., why he should not be punished for his misconduct in disobeying the order to appear before the referee and answer, &c. This order was granted upon due proof of the due service upon the de-

ment could not be issued against the body. It was then provided that when a warrant could not be issued, and the defendant resided out of the county, he might be proceeded against by a summons or attachment returnable not less than two, nor more than four days from date. If the defendant was proceeded against otherwise, it was declared that the justice should have no jurisdiction of the cause. (*See Laws of 1831, ch. 800, pp. 80-83.*) In *Clark v. Luce*, (15 *Wend.* 479,) it was held that an attachment could be issued by a justice against a defendant residing out of the county, without any affidavit. In making this decision the court overlooked, or did not give effect to, section 48 of the act of 1831, which declared that all the provisions of title 4 (the justice's act in the Revised Statutes) not expressly repealed, and not inconsistent with the provisions of that act, were to be in full force, and to apply to the provisions of the act, so far as the same related to the proceedings in courts before justices of the peace. In *Taylor v. Heath*, (4 *Denio*, 592,) *Clark v. Luce* is reviewed, and the act of 1831 more fully examined; and as by the Revised Statutes no attachments could be issued without an affidavit, it was held that such requirement of the Revised Statutes was still in force, and applied to the attachment given by the 88d section of the act of 1831. The same decision was made in *Bennett v. Brown*, (4 *N. Y.* 254.) The decision simply gave constructions to statutes, holding that by the statutes an affidavit was required. But for such construction of the statutes, *Clark v. Luce* would not have been overruled.

It will be noticed that the cases here referred to were cases of *attachment*, not *summons*. In *Waters v. Whitmore*, (18 *Barb.* 634,) it was decided that an affidavit was necessary to uphold a short *summons*, issued under the 88d section of the act of 1831 against a non-resident. This decision is not supported by authority, and has not, I think, been followed. The learned judge supposes that the summons mentioned in section 83 is a substitute for the warrant given by the Revised Statutes against a non-resident defendant, and as no warrant could issue without an affidavit, he supposes that the summons could not. This did not follow. By the Revised Statutes no affidavit was necessary in any case when the action was commenced by summons, and section 48 of the act of 1831 did not, by retaining in force the provisions of the Revised Statutes, and applying them to the provisions of the act of 1831, so far as they related to proceedings in courts before justices of the peace, require an affidavit in the

Rugg v. Spencer.

fendant of the order for him to appear before the referee and answer, &c. At all events, the order to show cause was duly made, and was duly served on the defendant on the 7th day of January, together with copies of all the affidavits and orders made in the case. There is no defect in the papers upon which the order to show cause was granted. By that order the defendant was summoned before the judge to show cause, if he had any, why the judge should not further proceed and punish him as for a contempt in disobeying the first order made by the judge. It was the business of the defendant to go before the judge upon the return of said order to show cause, and show his reasons for disobeying the first order. When required to do so,

new case of summons given in section 88. But as by the Revised Statutes an affidavit was required in cases of attachments, the effect of section 48 was to require an affidavit for the attachment given in section 88 of the act of 1881. Hence the decisions in *Taylor v. Heath* and *Bennett v. Brown*, (*supra*), to which the judge refers in *Waters v. Whitmore*; but they are no authority for the decision in that case. It has been seen that in all these cases the decisions turned upon the construction given to the statutes. Aside from the statutes, no doubt would have existed as to the jurisdiction of a magistrate to issue process authorized under a specified state of facts, without an affidavit of the existence of those facts. In the absence of any requirements that such affidavit should be made, the plaintiff would act at his peril.

If the facts necessary to give jurisdiction did not exist, and the party and justice proceeded, to the damage of the defendant, they would be liable as in other cases of a destitution of jurisdiction. If an action should be brought, founded upon the proceedings, it would be necessary to aver all the facts required to give jurisdiction; and so if the proceedings are attacked, the party defending under them must aver and prove the facts necessary to the jurisdiction. This is the general rule. In *Whitney v. Shufelt*, (1 Denio, 592,) the question in *Barnes v. Harris*, (4 N. Y. 875,) arose on the pleadings. It was an action founded upon a justice's judgment obtained in an action upon contract, commenced by a long summons under the Revised Statutes. As we have seen, a summons was authorized under certain specified circumstances. (2 R. S. 228, 814.) The pleader, in the complaint, did not state all the circumstances mentioned in the statute. He did not state that the defendant was a resident of the county in which he was proceeded against by the long summons, and as the Revised Statutes declared that no person should be proceeded against by summons out of the county in which he resides, it was supposed by the defendant's counsel that his residence should have been averred in the

Rugg v. Spencer.

he failed to show any cause, and the judge properly proceeded and made the final order in the case.

Section 302 of the Code, contained in the chapter relating to supplementary proceedings, provides: "If any person, party or witness disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge as for a contempt." It is to be observed that this section only requires that the order should have been duly served, in order to give the judge jurisdiction. It is not required that the order should be duly made, in order to give the court jurisdiction. If the order is not duly made, it is a question of practice or regularity, to be taken advantage of before the judge by objection.

IV. The plaintiff did not request that any question of

complaint, to show that the justice had jurisdiction, and a demurrer was interposed. It was held that the demurrer was not well taken; that such summons was the ordinary process of the court, and was lawfully issued upon the application of the plaintiff. Justice Bronson dissented. The question was one of pleading. It was not suggested, nor has it ever been, that an affidavit of the facts specified in the Revised Statutes authorizing a summons, should be made, in order to give the justice jurisdiction. The summons is issued upon the simple application of the party, and if it turns out that it was issued in a case where the justice had no jurisdiction, the action is dismissed. Jurisdiction may depend upon the residence of the parties and the justice in the same county.

As the Code, section 292, in a case like the present, does not require an affidavit, or any proof of the facts there specified, I am of the opinion that no affidavit or proof is necessary, to give the judge jurisdiction to make the order; that the question of jurisdiction depends upon the existence or non-existence of the facts specified in the statute. In the remaining cases mentioned in that section "proof by affidavit" is required. And I think the better practice is to make an affidavit in all cases.

The defendant's counsel has cited several cases. The question was not involved in *Sackett v. Newton*, (10 How. 560;) nor in *Webber v. Hobbie*, (18 id. 382.) In *Whitlock's case*, (1 Abb. 320,) there was an affidavit. It was objected that it was insufficient. The court held it sufficient. The question I have been considering was not made or considered. It seems to have been assumed, as I think it has generally been, that an affidavit was necessary. In *The People v. Hurlburt*, (5 How. 446,) there was an affidavit, which was held insufficient. The case was under the second clause of section 292 of the Code, which expressly requires proof by affidavit.

Rugg v. Spencer.

fact in this case should be submitted to the jury. If it was necessary to confer jurisdiction upon the county judge to make the first order supplementary to execution, that proof should have been made before him of the existence of the judgment and return of execution unsatisfied, yet it was still in this case a question of fact whether such proof had not been made. The plaintiff did not prove, on this trial, it had not been made. The plaintiff did prove that a judgment had been recovered against him, and also that an execution thereon had been duly issued and returned unsatisfied before the date of the order supplementary to execution. The plaintiff ought to have requested the court to submit the case to the jury, with instructions for them to find whether any sufficient evidence had been made before the judge to authorize the making of the order supplementary. By omitting to do so, he cannot now claim that the case should have been submitted to the jury. Instead of asking that the case be submitted to the jury, the plaintiff rested his case upon certain rulings which he requested the court to make upon other matters than the sufficiency of the proof made before the county judge, to entitle the defendant to the order supplementary to execution. It is now too late for the plaintiff to say that the court should have submitted to the jury whether any affidavit was made before the judge, upon which the order supplementary to execution was granted. (*Barnes v. Perine*, 12 N. Y. 18. *Winchell v. Hicks*, 18 *id.* 558.) It does not appear but that there was proof made before the county judge, of the judgment and the return of the execution unsatisfied. If any evidence was required, the judgment itself and the execution on file were sufficient, and *non constat* but that the judge inspected both.

V. The affidavits and judgment were sufficient evidence of actual loss by the judgment creditor to warrant the fine imposed by the judge. (3 R. S., *part.* 3, *ch.* 8, *tit.* 13, §§ 20, 21.)

Rugg v. Spencer.

By the Court, JOHNSON, J. The action was for false imprisonment. The defendant justified under proceedings supplementary to execution, by virtue of chapter 2, title 9, of the Code. This title makes provision for "the execution of judgment in civil actions," first, by execution; and second, by proceedings supplementary thereto, after execution shall have been issued and returned unsatisfied in whole or in part. It appeared upon the trial that the defendant in this action, who was plaintiff in the judgment in which the proceedings, in execution thereof, were instituted, obtained an order from the county judge of Cattaraugus county requiring the plaintiff, who was defendant in such judgment, to appear and answer concerning his property, before a referee named in such order. The plaintiff failed to appear in pursuance of the order, and was proceeded against before the same judge for contempt, by order to show cause why he should not be punished for such contempt. The plaintiff failed to appear or show cause on the day named in said order, and was adjudged guilty of contempt, and fined to the amount of the judgment and interest thereon, and the amount of the costs and disbursements in the proceedings for the misconduct and contempt, taxed at \$20, and ordered to stand committed until the fine should be paid. The plaintiff was imprisoned under this order, and for such imprisonment brings this action.

Two questions only, were raised upon the trial, and the same are insisted upon here: First. That the order to appear and answer first issued, was issued without any proof by affidavit before the judge, and was void. And, second, that the fine being for an amount over \$250, was greater than the judge was authorized to impose, which rendered that order and determination void also.

These questions will be considered in the order presented. The first order to the plaintiff to appear and answer on oath concerning his property, recites expressly

Rugg v. Spencer.

that it had been made to appear before the judge who issued the order, "by the affidavit" of one of the attorneys of the plaintiff in the action in which the judgment was obtained, that judgment had been recovered in the action; that execution thereon against the property of the defendant therein, had been duly issued, and returned wholly unsatisfied, and that said judgment remained wholly unpaid.

Assuming, without discussing or determining the question, that proof by affidavit was necessary before the judge, to enable him to issue a valid order, the recital therein that all the necessary facts had been made to appear before him by affidavit is clearly sufficient, *prima facie*, to show that such proof had been made by a regular affidavit. It is a presumption which the law raises in support of judicial authority and proceedings. The order speaks for itself, and as all the necessary facts, to constitute it a regular and valid order, appear upon its face, it will be deemed to be such, until the contrary is made to appear. This doctrine is well settled, and has been quite recently reiterated by this court.

But the plaintiff's counsel contends that even if he is driven to show that no proof by affidavit was in fact made before the judge when he issued the order, that fact was sufficiently shown to rebut the *prima facie* proof of the recital in the order, by the papers produced on the trial, and that the burden was thus cast upon the defendant of giving further proof, that an affidavit was presented. The paper relied upon to sustain this position was a paper in the form of an affidavit in the action, found on file in the office of the clerk of the county of Cattaraugus, reciting the facts as set forth in the order, signed by the plaintiff's attorney in the action, but not sworn to before any magistrate. There was no jurat nor the signature of any magistrate attached. On this paper was indorsed "at chambers, Decembers 21, 1867, read on motion, R. Lamb, county judge, filed December 21, 1867." This is the same

Rugg v. Spencer.

date as the order, and R. Lamb was the judge who issued the order. No other proof was made in regard to the paper. The orders and other papers in the proceedings supplementary appear also to have been filed in the same office. This paper furnished no proof, one way or the other, on the question. It was not a record which of itself imported verity, and there was no evidence whatever to show by whom the indorsement thereon had been made, or how it came to be on file in the clerk's office. The mere fact that the other papers in the proceeding were also found on file there, formed no basis for the legal presumption, and scarcely for a probable conjecture, that this was the paper presented and which the judge had mistaken for an affidavit. The mere presentation of that paper on the trial was no proof of any fact in the case whatever, and did not tend in any degree to disprove the recital in the order. The first order was therefore valid.

Was the plaintiff then, properly adjudged guilty of the contempt, and properly fined therefor? The Code, § 302, gives to the judge who issues the order in cases of this kind the power to punish as for a contempt. The proceeding in a case like this, is under part 3, ch. 8, title 13, of the third part of the Revised Statutes, (2 *R. S.* 534,) "of proceedings as for contempt to enforce civil remedies, and to protect the rights of parties in civil actions." By section 1 power is given, "to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause or matter depending in court may be defeated, impaired, impeded or prejudiced, in the following cases." Amongst the cases specified, in subdivision 3 of this section, is that for the non-payment of money ordered to be paid by a party to a suit in certain cases, "and for any other disobedience to any lawful order, decree or process of such court." By section 20 the court is required to impose a fine, or to imprison a defendant, or both, if it

Rugg v. Spencer.

shall adjudge him "to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede or prejudice, the rights or remedies of any party in a cause," &c. By section 21, "if an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party and to satisfy his costs and expenses;" and by section 22, "in all other cases the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings." The plaintiff here having failed to appear in pursuance of the order to show cause, the judge proceeded to inquire in regard to the alleged misconduct and contempt, and the consequences and effect of the same upon the rights and remedies of the plaintiff in such judgment. It was found that the plaintiff here, had been guilty of the misconduct, and it was also found, as recited in the order imposing the fine, "that such misconduct and contempt was calculated to and did actually impair, impede, defeat and prejudice the rights of said plaintiff in said supplementary proceedings." He was, thereupon, as appears, adjudged guilty of the contempt, and to pay the fine imposed. And, as appears upon the face of the order, "all of which is here imposed as a fine upon said defendant to indemnify the said plaintiff for his costs and disbursements and the damage and loss sustained by said contempt in the defeat of said proceedings." The plaintiff's counsel objects, that it does not appear expressly upon the face of the order, that the judge did in fact find that the plaintiff in the judgment had sustained any loss or injury by the misconduct alleged. The point is, that upon his own recital, he only found that the misconduct defeated the proceedings, and prejudiced the defendant's rights and remedies, and not that the misconduct had been productive of actual loss or injury. But it is expressly declared, in the order, that the fine is imposed to indemnify the plain-

Rugg v. Spencer.

tiff in the action, not only for his costs and disbursements in that proceeding, but also for "the damage and loss sustained by said contempt in the defeat of said proceedings." The preliminary recital may, perhaps, be somewhat defective in not stating expressly that it appeared that actual loss or injury had been produced. But this recital, though a very proper formal part of an adjudication or order of this kind, is not a vital or necessary part, nor is it at all conclusive as to all the facts which were made to appear before the officer, or that no other facts appeared. It is sufficient *prima facie* for what is contained in the recital. But the recital is no evidence that nothing else was shown, or made to appear.

The adjudication, or order, would have been valid without any such preliminary recital, and as it expressly appears in the body of the order that the fine was imposed to indemnify the plaintiff in the judgment "for the damage and loss sustained" in defeating the proceedings, the inference is conclusive that it did so appear before him, and that he so found.

Every reasonable intendment will be made to uphold the adjudication, when it is clearly within the jurisdiction of the tribunal to do what has been done.

It will be presumed, unless the contrary is shown by the party alleging the invalidity, that all the necessary facts were found which might have been found to support the judgment. It appears upon its face to be regular, and if anything was omitted by which it would be invalidated, it was for the plaintiff to show it. It was for him to show that he had been unlawfully imprisoned. I am of the opinion, therefore, that the nonsuit was right, and that a new trial should be denied.

New trial denied.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, March 6, 1871.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

THE PEOPLE, *ex rel.* The Erie and Genesee Valley Railroad Company, *vs.* J. NELSON TUBBS and others, Commissioners &c.

Under the common law writ of certiorari, courts have always reviewed and examined the acts, proceedings and determinations of the inferior tribunals or bodies to whom the writ was sent, so far as to see whether they had kept within their powers, or within the law under which they acted, in the matter complained of. *Per* JOHNSON, J.

If they have acted contrary to their powers, altogether, or exceeded them in any material particular, the writ furnishes a sufficient ground for the reversal of their acts or determinations.

No person is authorized to apply to a justice of the Supreme Court, under section 22 of the general railroad act, of 1850, for the appointment of commissioners to examine the proposed route of a railroad and to affirm or alter the same, except one whose lands have not been acquired by the company, and after the service on him of the written notice required by said section to be given by such company. And he must feel aggrieved by the proposed location over or through his land, and set forth his objections to the route designated through his land, in his petition.

The commissioners thus appointed are to examine the proposed route, and hear the parties before deciding; that is, the parties to the proceeding—the petitioner on the one side, and the company on the other—and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public.

It would be monstrous to hold that one landholder upon a route could, upon this hearing, force a different location, not only over his own land, but the lands of all his neighbors, who had had no opportunity of being heard in regard to it. The statute contemplates nothing of the kind, and was never intended to give, and does not give, any such power to the commissioners. *Per* JOHNSON, J.

This proceeding was designed not to put it in the power of a few individuals to obstruct and defeat the construction of railroads, but to give a remedy to a landholder who might sustain some extraordinary or peculiar injury from the proposed location, not common to other lands through which the proposed route lay, which could not be adequately compensated in damages, and which might be prevented and avoided by a change, upon the land, consistently with the just rights of both parties and of the public. *Per* JOHNSON, J.

Where it appeared, upon certiorari, that commissioners appointed under section 22 of the general railroad act had exceeded, and gone far beyond, the scope of their powers; had undertaken to canvass, and sit in judgment upon, the duties and obligations of the railroad company, under its charter, in locating its road generally, and in its choice of routes; and the testimony

The People v. Tubbs.

in respect to the injury to the petitioners and their lands was of the slightest and most frivolous character; and from the evidence before the commissioners, and the map by them returned, of both routes and of the entire premises, it was impossible to discover any benefit which could accrue to the petitioners, by the new location, over the one proposed by the company; and it appeared clear, upon the whole case, that considerations quite different from those of injury to the petitioners' lands and the hope of ameliorating such injury, influenced and governed the actions of the commissioners, the direction and determination of the commissions, changing the proposed route of the railroad, was reversed, and held for naught.

A copy of the petition for appointment of commissioners, under the 22d section of the general railroad act, should be served upon the railroad company, as a part of the notice of hearing before the commissioners, so that the company may be advised of what it is to meet.

The statute provides, in terms, for a hearing before the commissioners, after they shall have been appointed, of the *parties*, which of course includes the railroad company as one of the principal parties to the proceeding.

THIS case is a writ of *certiorari* sued out upon affidavit of the relator's attorney, to review the proceedings of the respondents as commissioners appointed, pursuant to the 22d section of the general railroad act of the State of New York, passed April 2, 1850, by Justice E. DARWIN SMITH, upon the petitions of William Hartman and George Hartman, land owners.

The section of the statute above referred to is as follows: "Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route intended to be adopted by such company in said county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company, of the route so designated. Any party feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, apply to a justice of

The People *v.* Tubbs.

the Supreme Court, out of court, by petition, duly verified, setting forth his objections to the route designated; and the said justice may, if he considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and after hearing the parties, to affirm or alter the same, as may be consistent with the just rights of all parties and the public; but no alteration of the route shall be made, except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall, within thirty days after their appointment, be made and certified by them, and the certificate filed in the office of the county clerk," &c. (*Laws of 1850, ch. 140.*)

The facts disclosed by the affidavit upon which the *certiorari* was allowed, and the return of the commissioners, were as follows: On the 13th of May, 1870, notice was served upon the petitioners, pursuant to the 22d section of the above mentioned act, describing the lands of the petitioners, proposed to be taken for the purpose of the road. On the 26th day of May, the petitions of Wm. Hartman and Geo. Hartman were presented to Justice SMITH, who made an order appointing the respondents commissioners under the said 22d section. On the 10th of June, 1870, notices were served on the treasurer and attorney of the railroad company, of the meeting of the commissioners on the 15th of June. On that day, two of the commissioners, only, attending, the proceedings were postponed until the 16th, when, all the commissioners being present, they proceeded to examine the proposed line of the road, and then further postponed the proceedings to the 20th of June, at 2 o'clock, P. M. Such postponement, the commissioners return, was upon their own motion, for the purpose, as stated in their original return, of "procuring the map of the company on file, and the attendance of the engineer who surveyed and laid out the road," and for the additional

The People v. Tubbs.

purpose, as appears in their amended return, "to give the parties desiring to be heard further time to prepare their testimony." On the 20th the commissioners met and proceeded to take testimony, not only on the subject of the location of the road across the lands of the petitioners, but upon the subject of its general location. They determined to alter the route adopted by the company across the lands of the Hartmans, in the manner indicated on a map attached to their report. On the 21st the commissioners made their report, which was filed in the Livingston county clerk's office on the 24th day of June, 1870. Copies of these petitions were never served upon the railroad company or any of the parties interested.

John A. Van Derlip, for the relator.

S. D. Faulkner, for the respondents.

By the Court, JOHNSON, J. This is a common law *certiorari*, to review the proceedings and determination of the respondents as commissioners, appointed on the petitions of certain persons, to examine the proposed route of the relators' railroad, under section 22 of the act of the legislature of 1850, "to authorize the formation of railroad corporations, and to regulate the same." (*Sess. Laws of 1850, ch. 140.*)

Under this writ courts have always reviewed and examined the acts, proceedings and determinations of the inferior tribunals or bodies to whom the writ was sent, so far as to see whether they had kept within their powers, or within the law under which they acted, in the matter complained of. (*Le Roy v. Mayor &c. of New York*, 20 *John*. 430. *The People v. Board of Assessors, &c.*, 39 *N. Y.* 81.) If they have acted contrary to their powers altogether, or exceeded them in any material particular, it furnishes a sufficient ground for the reversal of their acts

The People v. Tubbs.

or determinations. It becomes necessary, therefore, to examine the statute under which the respondents were appointed, for the purpose of ascertaining what powers they possessed by virtue of their appointment. By section 22 of the statute before referred to, every company formed under it is required, before constructing any part of their road, into or through any county named in their articles of association, to make a map and profile of the route intended to be adopted in such county, and file it in the office of the clerk of such county. It is then required to give written notice "to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by, or given to, the company, of the route so designated." The statute, it will be seen, contemplates, and inferentially authorizes, the company to acquire, by gift or purchase, the lands for its proposed route, to any extent, before giving notice to the occupants of the lands which have not been so acquired. If it can do so, it may acquire the title to lands for the entire route, except one parcel, and then give notice to the occupant of that parcel. The section then provides that "any party feeling aggrieved by the proposed location may, within fifteen days *after receiving written notice, as aforesaid,*" apply by petition, setting forth his objections to the route designated, to a justice of the Supreme Court, out of court, and such justice may, if he consider sufficient cause therefor to exist, appoint three disinterested persons to examine the proposed route.

It thus appears that no person is authorized to make the application except one whose lands have not been acquired by the company, and after the service on him of the written notice provided for. He must feel aggrieved by the proposed location over or through his land, and set forth his objections to the route designated through his lands, in his petition. I have assumed that the grievance and objections must relate to the route over the lands of

The People v. Tubbs.

the party making the application, because such is clearly the spirit and intention of the whole section. This will be enlarged upon and more fully stated hereafter.

The commissioners thus appointed are then authorized and empowered "to examine the proposed route, and after hearing the parties, to affirm or alter the same, as may be consistent with the just rights of all the parties, and the public." The question here arises, how extensive an examination of the proposed route, and change of the same, these commissioners can make under this power. Must the change they make be confined to the land of the aggrieved party, at whose instance they have been appointed, or may it extend through the entire route of the road, from one end to the other; or through the entire county in which the lands of the petitioner lie, over lands whose owners are satisfied with the proposed location on their lands, and prefer it to any other, and away from the lands which the company has already acquired on the route proposed? It would seem that it could only be necessary to propound such a question, to suggest an undoubting and conclusive answer in the negative. They are to examine the proposed route and *hear the parties*, before deciding. What parties? Clearly the parties to the proceeding—the petitioner on the one side, and the company on the other; and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public. It would be monstrous to hold that one landholder upon a route could, upon his hearing, force a different location, not only over his own land, but the lands of all his neighbors, who had had no opportunity of being heard in regard to it. It is entirely clear that the statute contemplates nothing of the kind, and was never intended to give, and does not give, any such power to the commissioners. If the construction contended for on the part of the respondents were to prevail, no railroad could ever be constructed, against a factious and determined opposition.

The People v. Tubbs.

This proceeding was obviously designed not to put it in the power of a few individuals to obstruct and defeat the construction of railroads, but to give a remedy to a landholder who might sustain some extraordinary or peculiar injury from the proposed location, not common to other lands through which the proposed route lay, which could not be adequately compensated in damages, and which might be prevented and avoided by a change upon the land, consistently with the just rights of both parties, and of the public. No such grievance is set forth in the petitions on which the order appointing the commissioners in this case was granted.

Looking at the matter in the light of these proceedings, it is quite apparent that the judge who made the order ought not to have been satisfied that sufficient cause existed therefor. It is quite safe, I think, to assume that could he have foreseen that the commissioners so appointed would claim and undertake to exercise the powers and functions attempted to be exercised by them, no such order would ever have been granted. That the commissioners, by their action and determination, have greatly exceeded the powers conferred upon them by the statute, and the order appointing them cannot, I think, be seriously doubted or questioned.

This will be rendered quite apparent by an examination of the proceedings before them, as they appear in the return to the writ. There was no hearing of the parties to the proceeding, (which were the petitioners on the one side, and the company on the other,) before the commissioners. The company, claiming and assuming that no such notice as it was entitled to, of the proposed hearing before the commissioners, had been given, refused to appear, or to have anything to do with the hearing or proceedings, and did not appear. But in order, as it would seem, that the petitioners might not go undefended, and without an adversary, a third person, not a party to

The People v. Tubbs.

the proceeding in any way, but the owner and occupant of lands adjoining the lands of one of the petitioners, upon whose lands the company had located its depot grounds, and who had agreed with the company for said location, and the location of the route of the road through his premises, was permitted to appear as a volunteer antagonist to the petitioners. An issue was improvised for the occasion, between these parties, not relating to any matter set forth in the petition, but to the propriety and justice of the proposed route and location of the road through the lands of this volunteer opponent, and still further south, through the village of Dansville, as it respected the interests of the company and the duties it owed to its stockholders generally. This issue, which appears to have been in a great degree personal, and to have been characterized by much asperity of feeling—at least between the witnesses—the commissioners proceeded to try and determine. On the part of the petitioners, the former engineer of the company, who had recently been discharged from its service, was called to prove that he had advised the company to locate on a route further to the west, which would pass through Jefferson street in the village of Dansville, and which would intersect the present proposed route about two miles south of said village; and that the road could be constructed on that route at least \$30,000 cheaper than on the route proposed. On the other side, several of the directors of the company and other witnesses were called to prove that the present proposed location was chosen by the directors of the company, under and in pursuance of the advice of this engineer; as the cheaper and more feasible route. This testimony on the part of the petitioners was objected to by the contestant, on the ground that the commissioners had no authority to try any such question; but the objection was overruled and the testimony received. This issue appears to have been decided in favor of the petitioners and the engineer, and adversely to the con-

The People v. Tubbs.

testant. That it was determined, and entered into the conclusion arrived at, appears plainly from the order made by the commissioners. In this order they say: "The commissioners further certify, that it appears from the evidence taken by them, that the location of said road through the premises of William and George Hartman is not the best route to enable the company to comply with the undertakings contained in their articles of association; neither the best location as affecting the interests of the petitioners or the public." They then proceed to rectify what they regarded as the delinquencies of the company in respect of their undertakings in the articles of association; and instead of affirming or altering the route over the petitioners' premises, as authorized by statute, break up the proposed route altogether, and destroy its continuity, and survey and locate a new route entirely, through the entire premises of two of the petitioners, and affirm the proposed location of the company over the lands of the third petitioner. This new location by the commissioners is not connected with the proposed route of the company, either over the lands of the petitioners, or at either end. It leaves a gap between the location of the company on the adjoining lands at the north end, of about one hundred feet, and at the south end, of five or six hundred feet.

The commissioners have left it to the company to change its route and get to their location as best it may. It was evidently not the design of the commissioners in making their new location, that it should be connected at the south end with the location adopted by the company on the lands adjoining, but that the line should be extended by the company on the other route through Jefferson street in the village of Dansville, which the company had not selected, but which the commissioners think it ought to have selected in order "to comply with the undertakings contained in their articles of association." What new

The People v. Tubbs.

difficulties the company might encounter should it undertake to change its present proposed route, to the westerly or Jefferson street route thus favored by the commissioners, or what new commissioners, with views adverse to the views of these commissioners, it might be called upon to contend with, is quite foreign to the present inquiry. These considerations, however, are quite suggestive, on the question of the true construction of the statute. It is enough for the present purpose that the commissioners have exceeded, and gone far beyond, the scope of their powers. They have undertaken to canvass, and sit in judgment upon, the duties and obligations of the company under its charter in locating its road generally, and its choice of routes away from the lands of the petitioners. Indeed, that subject was almost the only topic on which they heard evidence. The testimony in respect to the injury to the petitioners and their lands, is by one of them only, and is of the slightest and most frivolous character. All the complaint he makes is, that the route proposed "runs parallel to with Main street and cuts two lots nearly in the center, leaving about thirty rods on each side inconvenient to water." The same facts, substantially, were admitted to exist in respect to the lands of the other petitioner, over whose lands the commissioners located the new route. It is quite obvious that the injury to the lands of the petitioners, and a remedy for that by a change of the proposed route, formed quite an insignificant item for consideration in the minds of the commissioners. And in examining the testimony before the commissioners, and the map by them returned, of both locations and of the entire premises, it is quite impossible to discover any benefit or advantage which can accrue to the petitioners by the new location, over the one proposed by the company. The inconvenience in regard to water is in no respect obviated by the new location, and the fields appear to be cut and left in a more irregular and in-

convenient shape by the change. In regard to buildings, there was no dangerous proximity of the old route, considered with reference to what is quite usual and common in such cases. In fact, in that regard, there is very little advantage in the new location over the old. The commissioners in their return, state that the route proposed by the company passed through the orchard on the farm of the petitioner William Hartman. Nothing of this kind appears in the testimony before the commissioners, nor on the map, and the return does not show what portion of the orchard is so passed through, nor how many trees would be destroyed thereby. But an injury of that kind could readily and fully be compensated in the award of damages.

In short, it is quite certain, upon the whole case, that considerations quite different from those of injury to the petitioners' lands, and a change to obviate or ameliorate such injury, influenced and governed the action of the commissioners. So far as a legitimate exercise of the powers confided to them is involved, they might just as well have made the new location at right angles with that proposed by the company, and thus compel it to change its entire route from one terminus to the other, in order to connect with the new location. The stretch of power would have been somewhat more glaring and conspicuous in that case, but none the less real and certain.

On the question of notice to the relator of the hearing before the commissioners, I am of the opinion that a copy of the petition should have been served, as part of the notice, and that such should be the practice established in such cases. A majority of this court has already held in this proceeding, that the land holder feeling aggrieved by the proposed location may apply and have commissioners appointed *ex parte*, upon his petition, without notice to any one. The statute, as we then thought, contemplated a proceeding somewhat summary in its character. But

The People v. Tubbs.

the statute provides, in terms, for a hearing before the commissioners after they shall have been appointed, of the parties, which of course includes the company, as one of the principal parties to the proceeding.

The hearing is to be upon the matters set forth in the petition, and it would be quite improper and unjust to compel the company to come to the hearing without being furnished in any way, with the allegations of grievance set forth in the petition, in time to make preparation to meet them in the usual way. It is no answer to say that the company might have obtained the petitions by a proper application or by diligent search. It was the duty of the party prosecuting the proceeding to furnish it as a part of his notice, so that his adversary might be advised of what he was to meet. This is consistent with the just rights of all parties, and those rights can never be secured and preserved in safety in any other way.

For the foregoing reasons, I am of the opinion that the direction and determination of the commissioners, changing the route of the company, in the manner set forth in their order and decision, should be reversed and held for nought, but without costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, March 6, 1871.
Mullin, P. J., and Johnson and Talcott, Justices.]

WALLACE vs. DREW and others.

It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank, to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this, he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go, in ordinary floods; otherwise he will be liable for the injury. But this rule does not apply to floods altogether extraordinary and unusual.

Where it appeared that, although certain banks and erections made by the defendants, on their own premises, to guard the bank and prevent the waters of a stream from injuring such premises, had caused the waters of the creek to flow in a new direction upon the plaintiff's lands, where they did not belong, and were not accustomed to flow, and where they would not have gone, but for those guards and erections; yet, as all the water which flowed upon the plaintiff's premises, on the occasion of the injury complained of, did not come from the branch of the creek which flowed through the defendants' lands, or by means of their guards and erections; but that an obstruction placed by one M. in the channel of another branch of the same stream, which stream divided above the defendants' premises, had caused the waters of that branch, as well as those of the defendants' branch, to flow, at the same time, in about equal proportions, upon the plaintiff's land, and both streams had contributed to the injury complained of; *it was held* that it would be manifestly unjust to make the defendants respond for the portion of the injury and damage occasioned by the wrongful act of M., who was in no way connected with them, in act or interest, and whose obstruction was wholly upon his own land, and upon another stream.

A PPEAL from a judgment entered upon the report of a referee.

The action was brought to recover damages for, and to restrain, the obstruction of a water course running through the lands of the defendant Nancy Drew.

On the trial before the referee, when the plaintiff rested, the defendant Clark Drew, moved for a dismissal of the complaint as against him, on the following grounds: 1st. That the plaintiff has failed to prove a cause of action against the defendant Clark Drew. 2d. That the evidence shows that the defendant Clark Drew had no proprietary interest whatever in the premises in question, or in the nuisance, or any jurisdiction over it, and an

Wallace v. Drew.

action in equity to abate the nuisance, or to enjoin the discontinuance thereof, must be brought against the owner of the nuisance, or some person who for the time being has an exclusive proprietary interest in, or jurisdiction of it, and therefore no cause of action exists herein against him.

The court denied the motion ; to which ruling and decision the counsel for the defendant Clark Drew duly excepted.

The defendant John Drew then moved for a dismissal of the complaint as against him, on the following grounds : 1st. That the plaintiff has failed to prove a cause of action against the defendant John Drew. 2d. That the defendant John Drew, having no proprietary interest whatever in the premises in question, or in the nuisance in question, and no jurisdiction or control of said nuisance, no cause of action exists against him for continuing the same, or for damages occurring from its erection. The court denied the motion ; to which ruling and decision the counsel for the defendant John Drew duly excepted.

The defendant Nancy Drew then moved for a dismissal of the complaint as against her, on the following grounds : 1st. The plaintiff has failed to prove a cause of action against the defendant Nancy Drew. 2d. That the defendant Nancy Drew, not having participated in the erection or continuance of said nuisance, and being a married woman, the defendant John Drew, being her husband, no authority to erect or continue said nuisance is implied by reason of her interest in the premises or the nuisance in question, and no cause of action exists against her herein, either jointly or severally. The court denied said motion ; to which ruling and decision the counsel for the defendant Nancy Drew duly excepted.

The referee found the following facts :

1st. That at and for twenty years prior to the time of the commencement of this action, the plaintiff was the owner and in the possession of a farm of about seventy

Wallace v. Drew.

acres, situated on lot No. 21, in the town of Albion, Cattaraugus county, New York, and lying on both sides of a highway leading from Cattaraugus station to Little Valley, upon which farm the plaintiff has valuable farm buildings, an orchard and other improvements.

2d. That during the same time, the defendant Nancy Drew has been the owner of a valuable farm situate on lot No. 20, in said town, and lying upon both sides of the same highway, and the defendant John Drew is the husband of the defendant Nancy Drew, and the defendant Clark Drew is the son of John and Nancy, and the said John Drew, Nancy Drew and Clark Drew, have been in the occupancy of the premises last described for six years prior to the commencement of this action.

3d. That there has been for more than twenty years prior to the commencement of this action, a natural stream of water, flowing from the east towards the west, upon the farm of said Nancy Drew, and from the point where the said stream enters upon the farm of Nancy Drew to the point where it empties into a brook which runs nearly north and south, and is west of the Little Valley road, the natural channel of said stream is entirely upon the said farm. That said stream is not constant, but at times is, and has been for many years, violent.

4th. That the defendants, prior to the commencement of this action, built and caused to be built, and kept up and have caused to be kept up, upon the south bank of the stream, commencing near the point where the stream enters upon the farm of said Nancy Drew, and extending for several rods down the stream, an embankment of boards, timber, logs, brush and gravel, which embankment was begun on the south bank of the natural channel of said stream for the purpose of protecting said south bank, but which the defendants wrongfully extended into the natural channel of said stream; and that by reason thereof the waters of said stream were wrongfully ob-

Wallace v. Drew.

structed, and caused to flow unnaturally against and over the north bank of said stream, and the natural channel of said stream filled up by such wrongful obstructions.

5th. That afterwards, and before the commencement of this action, the defendants, for the purpose of preventing the waters of said stream from flowing across the lands of said Nancy Drew to the brook west of the Little Valley road, as they would naturally flow, built and caused to be built, a tight board fence upon their said farm, along the Little Valley road, and by means thereof wrongfully obstructed the waters of said stream, and diverted them from their natural course to their outlet in the large brook west of the Little Valley road.

6th. That by reason of said obstructions, so wrongfully erected, and kept up and maintained by the defendants, the waters of said stream were diverted from their natural course and channel, and in the summer of 1869, prior to the commencement of this action, flowed violently down and along the Little Valley road, upon and across the farm of the plaintiff, washing out a wide deep channel in the highway, in front of the plaintiff's farm, and between the portions of his farm lying upon opposite sides of the said highway, and entered upon the inclosed lands of the plaintiff, and injured and destroyed his crops there growing, and undermined and uprooted his trees, and washed away the land and soil of the plaintiff, and that by reason thereof the plaintiff sustained damages to the amount of \$500.

7th. That so long as the said obstructions remain and are kept up by the defendants, the plaintiff's lands are in danger of being overflowed, and his buildings being undermined, and his crops being destroyed.

The referee found as conclusions of law :

1. That the plaintiff was entitled to recover of the defendants the sum of \$500, and one year's interest thereon, \$35, in all \$535, for the damages sustained by him by rea-

Wallace v. Drew.

son and on account of the wrongful acts committed by the defendants.

2. That the plaintiff was entitled to the judgment of this court, enjoining the defendants, and each of them, and all persons claiming under them, or either of them, from stopping or obstructing, or continuing to stop and obstruct the free passage of the water in the brook crossing the lands of the defendant Nancy Drew, from east to west, in their natural course and channel.

He accordingly ordered judgment for the plaintiff against the defendants, with costs to be taxed. From the judgment so entered, the defendants appealed.

Carey & Jewell, for the appellants.

I. It is insisted that there is no evidence which renders the defendants liable. 1. The findings of the referee are based upon the theory that the erection of the fence and embankment along the south bank of the stream, and of the board fence west of the Little Valley road, caused the water to overflow the north bank, and thence down the road to the plaintiff's land, and hence the defendants are liable. This theory is not sound, for the following reasons: 1. There is no evidence showing that either of said erections were within the original channel of the stream, but on the contrary, it clearly appears that they were outside such channel, and in locations where the defendants had an undoubted right to erect them. 2. The defendants had a clear right to construct the fence west of the Little Valley road, entirely away, as it is, from the channel of the creek; yet it is conceded that the water from this stream would not have passed down the road to the plaintiff's land but for this fence. The defendant may legally erect any work to prevent his lands being overflowed by any change in the natural state of the river, and to prevent the old course from being altered. (*Angell on Water Courses*, § 333.) So to sustain the referee, it must be held that the

Wallace v. Drew.

defendant must permit the encroachments of this stream to ravage her farm, without attempting to stay its random course, because, forsooth, it may flow on to the premises of the plaintiff. 3. It appears as an undisputed fact, that Milk erected a tight board fence across the channel of the north branch, at the crossing of the Little Valley road, between the plaintiff's land and the stream in question, and that but for such erection the water flowing down said Little Valley road would have passed into the channel of said north branch, and so down to the main creek west, and would not have reached the plaintiff's lands. And yet the referee comes to the extraordinary conclusion that we are responsible, because we built a fence on our own land against which the overflowing water ran, and that without any pretense that by so doing we obstructed the water in any legitimate channel. 4. There is no evidence that the defendants ever interfered with the original channel of this stream, or made erections which changed the channel. It does appear that the bed of the stream was filled up with gravel at certain points, about two years before suit, and that when the channel was so filled up, the water ran off both ways, but mainly to the north. The deposit of gravel now is not different from what it was before the embankment was built. After the fence was built along the south bank, the bank was washed out south of the fence, leaving it in the stream. There is no evidence showing that the fence caused the stream to overflow, but on the contrary, it is apparent that the filling up of the channel by natural causes was the direct cause of such overflows. The bed of the stream was filled up by sudden freshets, and none of the acts of the defendants contributed to that result. The fence on the south bank was erected at a low place outside the channel, and had the effect of preventing the water from flowing over the bank at that point towards the defendants' house. There is no evidence produced on the part of the plaintiff, show-

Wallace v. Drew.

ing the location of the original channel. The witnesses speak of a log or tree, ploughing, &c., in the stream, but it does not appear that any such operations were located in the old channel. The conclusion reached by the referee, in the face of the above undisputed facts, is clearly error. 5. The defendants are not responsible for a change in the bed or current of the stream, brought about by natural or providential causes, nor were they bound, after the change had taken place, to restore the stream to, and keep it within, its original channel. (*Jones v. Turner*, 46 Barb. 527.) 6. If from any cause, particularly a natural cause, the stream, leaving its natural channel, overflowed or encroached upon the lands of the defendants, they had the right to protect their land by the erection of artificial structures on the line of the original bank, even though the erection of such structure, owing to the operation of natural causes below, tended to throw the water upon the lands of another. (*Angell on Water Courses*, §§ 332, 334.) It was the right of the plaintiff to build against such overflowing waters. (29 N. Y. 459.)

II. The defendant Nancy Drew being the sole owner of the premises in question, an action in equity to abate a nuisance or to enjoin a discontinuance thereof on such premises, will not lie against the defendants John and Clark Drew. The claim of damages is a mere incident of the action, and unless the action can be maintained for that which constitutes its gist and gravamen, it should be dismissed. Mere employees, such as mechanics and laborers, who are employed in the erection of a nuisance, are not liable to such an action; the reason being, that having no proprietary interest in, or control over it, they would be guilty of a trespass as against the owner, should they undertake to abate it; and the law never compels a party to commit a trespass, or protects him in so doing. We submit that the motion for a dismissal of the complaint as against Clark and John Drew, was improperly denied.

Wallace v. Drew.

(*Angell on Water Courses*, §§ 402, 404.) They are required by the judgment to remove that in which they have no right or control over.

III. The defendant Nancy Drew, wife of the defendant John Drew, not having participated in the erection or continuance of the alleged nuisance, no authority to erect or continue said nuisance is implied by reason of her interest in the premises, and no cause of action exists against her herein, either jointly or severally. There is no evidence that she had anything to do with the erection of the nuisance, or was ever notified to remove it. This renders the proof insufficient as to her. (*Hubbard v. Russell*, 24 Barb. 404.)

IV. The rule of damages adopted by the referee is erroneous. The witness is asked the value of the whole farm before and after alleged damage, while there is no pretense that more than an acre or so is injured. There is no foundation laid by showing such an injury as affected the value of the entire farm.

The amount of damages allowed is excessive, and was evidently based upon the wild guesswork of the witnesses Porter and Smith, which was erroneous. The damages should have been assessed on the basis of the facts proven. (*Newman v. Wells*, 12 Wend. 161.)

Henderson & Wentworth, for the respondents.

I. The first, second and third findings of fact are not excepted to or controverted. The fourth, fifth, sixth and seventh findings of fact, which are excepted to, are abundantly sustained by the evidence. Upon these questions of fact we only ask the court to read the evidence in connection with the map showing the location of the stream, situation of the premises, and the several acts of the defendants in obstructing the stream and thereby causing the water to flow from the defendants' lands on to the plaintiff's lands. The facts found by the referee are not only abundantly proved, but they are not controverted by the defendants.

II. The referee did not err in his conclusions of law contained in his report. 1. The referee decides that the plaintiff is entitled to recover \$500 damages and one year's interest thereon, \$35, amounting to \$535. The evidence on the question of damages fully sustains this finding. The real injury to the plaintiff's farm was done in the summer of 1869, and prior thereto. 2. The defendants except to this finding upon the question of damages as a whole. They do not specifically except to the allowance of interest. Hence the finding as to the \$500 damages being correct, and the finding as to the interest being a separate and distinct finding, and not specifically excepted to, the general exception does not raise the question as to the correctness of the allowance of interest. (20 N. Y. 463, 469, 470.) 3. The interest was properly allowed as part of the damages. (5 Cowen, 587. *Spencer, senator*, 608 to 614.) 4. If the interest was not properly allowed, the plaintiff may be required to abate it by stipulation, and the error thus cured without a new trial. 5. The referee, in his second legal conclusion, decides that the plaintiff is entitled to judgment enjoining the defendants from the commission of the acts complained of. The plaintiff is obviously, from the whole case, entitled to this relief. The current of the stream is swift; its floods and freshets are its certain natural characteristics and condition; its banks and bed are composed of loose gravelly soil; the amount and value of the plaintiff's property imperilled by its obstruction is large; the continued and serious injury that the plaintiff's property is absolutely certain to sustain if the defendants be permitted to obstruct the natural flow of the water on their land, makes this decision the only real and substantial protection the plaintiff can have against the wrongful acts of the defendants. If the defendants undertake to protect their own land by placing fortifications in the channel or on the bank of the stream, whether that channel be the original channel or some new

Wallace v. Drew.

channel which the stream has made for itself, on their land, they are bound to see to it that these fortifications and obstructions do not cause the water to flow from their lands on to the plaintiff's lands. (*Angell on Water Courses*, §§ 333, 334, 336. *Jones v. Turner*, 46 Barb. 527. 56 id. 480.) The facts that all the water in the stream in question would have flowed westerly across the defendants' farm, into the large stream on the west end of the farm, and that none of it would have flowed on to the plaintiff's farm if the defendants had not obstructed it, are not controverted by the evidence.

III. The referee did not err in his several rulings on the trial. The third ruling was as to the value of the plaintiff's meadow lot, where the hole was made by the water. The evidence called for by this question did not tend to establish an improper measure of damages. The measure of damages is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendants' acts. (51 Barb. 94. 24 id. 273.) The witness had testified that he knew the value of the plaintiff's land; had seen where the water cut the plaintiff's land; that the plaintiff's farm was worth \$100 per acre before the water damaged it; that there are sixty acres of it; that he knew the meadow lot where the hole was made by the water. The question called for the value of the land with the injuries complained of, and tended to establish the correct measure of damages, and for that purpose was proper. No other objection was pointed out to the referee.

IV. The referee did not err in refusing to dismiss the complaint, as to either defendant. Nancy Drew has owned and lived on the farm for the last ten years. John and Clark Drew, her husband and son, lived on the farm during that time, and carried it on, with the aid of some younger children. They were all living on the farm at the commencement of this action. The defendants all aided, assisted and countenanced the erection and main-

Wallace v. Drew.

tenance of the obstructions complained of. It is submitted that the grounds stated on the motion to dismiss the complaint, as to each defendant, have no force or application to the facts of the case, and are wholly untenable.

By the Court, JOHNSON, J. It is well settled, that every person through whose land a stream of water flows, may construct embankments and other guards on the bank to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this, he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go, in ordinary floods. If he does, he will be liable for the injury. This is upon the familiar principle that a person must so use his own as not to injure another. But this rule does not apply to floods altogether extraordinary and unusual. (*Angell on Water Courses*, § 334.)

The referee has found, and I think upon evidence which warrants such finding, that the banks and erections made by the defendants to guard the bank and prevent the waters of the stream from injuring their own premises, have caused the waters of the creek to flow northward and upon the plaintiff's lands, where they did not belong, and were not accustomed to flow, and where they would not have gone but for these guards and erections. Were this the only question in the case, I should be unable to find any reason for interfering with the judgment.

But the damages given by the referee seem exceedingly large, in any view of the facts. Only about one eighth of an acre of land was washed out by the action of the water, and this, one witness testifies, injured the whole farm \$40 per acre, and reduced its value to that extent. Another witness testifies that in his opinion the premises were injured \$50 per acre. This is the testimony as to the damage, on the plaintiff's side. Neither witness gives any grounds or reasons for this extraordinary estimate. On

Wallace v. Drew.

the other side five witnesses are examined in regard to the damage, and they put the entire damage at from \$30 to \$80. This is a wide difference, and as it was all a matter of opinion, care should be taken to see that the damages are not excessive. Without some explanation, it seems incredible that the injury to the other lands could have been so great.

But there is a more serious difficulty on this question of damages. It appears, without any dispute or contradiction, that all the water which flowed upon the plaintiff's premises, on that occasion, did not come from the branch of the creek which flowed through the defendants' lands, or by means of their guards and erections. Just above the defendants' premises, the stream divides into two branches, the south branch flowing through the defendants' lands, and the north branch through the lands of one Milks, which adjoin the plaintiff's lands on the south. The waters from the defendants' branch of this creek could not possibly get to the plaintiff's land without running nearly at right angles across the north branch of this creek. It appears that the water runs in these two branches in about equal proportions, and that some years ago a dike was put in above Jones' bridge in order to effect an equal division of the volume of water in the two streams. The water, when it left the defendants' premises, on the occasion of the injury complained of, ran north down the Little Valley road, which road crossed the north branch just south of the plaintiff's premises. Below this road Milks had put a tight fence entirely across this north branch, which had the effect to throw the water of this north branch upon the plaintiff, and also to prevent the water coming from the defendants' branch from passing off down that branch instead of crossing and flowing over upon the plaintiff's land. And so it appears, without any dispute, that this obstruction of Milks in the channel of the north branch, caused the waters of that branch as well

Harden v. Boyce.

as of the defendants' branch, to flow at the same time upon the plaintiff, and both streams contributed to the injury. This Milks testifies to, and it is nowhere disputed. This being so, the defendants should not be mulcted for the whole damage. The proximate cause of the injury was at least as much, if not more, the obstruction of Milks across the north branch as the defendants' erections. Where the animals of different owners injure and destroy the property of another, the owner of each is only liable for the injury done by his animals. (*Partenheimer v. Van Order*, 20 Barb. 479. *Van Steenburgh v. Tobias*, 17 Wend. 562. *Auchmuty v. Ham*, 1 Denio, 495.) It would be manifestly unjust to make the defendants respond for the portion of the injury and damage occasioned by the wrongful act of Milks, who was in no way connected with them in act or interest, and whose obstruction was wholly upon his own land, and upon another stream.

I am of the opinion, therefore, that the judgment should be reversed, and a new trial ordered, with costs to abide the event, and the order of reference vacated.

New trial granted.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, March 6, 1871.
Mullin, P. J., and Johnson and Talcott, Justices.]

HARDEN vs. BOYCE.

When a war is commenced between nations, it arrests, *eo instanti*, all commercial intercourse and voluntary communication with the enemy, without the permission of the government; and the citizens or subjects of one belligerent become the enemies of the other, and of all its citizens or subjects.

These results of war *inter gentes* were substantially applied to the citizens of the Confederate States, during the late conflict.

In the late rebellion there existed, between the government of the United States, and the Confederate States, a state of civil war, in the sense of inter-

Harden v. Boyce.

national law, which brought with it the common incidents of war, and arrested all commercial intercourse and communication between the citizens of those States, respectively.

An indorser's engagement is a conditional one, to be made absolute upon the observance of such formula as are prescribed by law; unless waived, or rendered unnecessary by facts and circumstances attending the maturity, demand and refusal of payment, recognized by commercial law.

Where a promissory note, payable in the city of New York, matured during the civil war, there being no pretense that notice of dishonor had been waived, or was unnecessary; it was held that an indorser residing in the State of South Carolina was entitled to notice; but that the holder was under no obligation to send it, as long as the impediment occasioned by war existed.

That it was his duty, however, to send it when the interruption of intercourse ceased.

That it was not a sufficient performance of his duty to the indorser to deposit in the post office at New York, a notice of protest addressed to him at his residence in Greenville, in the State of South Carolina, on the 4th of October, 1861, when open war prevailed between the government of the United States and the Confederate States, and there was no longer any actual mail communication between New York and South Carolina, and all intercourse or communication between the citizens of those States, respectively, was unlawful, and prohibited.

And that the holder, when he deposited such notice, did not put it in such course of transportation and delivery as would accomplish the duty imposed on him by law.

That the holder must be held to have known of the existing condition of the country, and the prohibition of intercourse; and he could not, therefore, cast upon the government the burden of preserving his letter, or its contents, until the termination of hostilities.

THE action is against the defendant as indorser of a promissory note, of which the following is a copy:

"\$3802.76.

New York, October 1st, 1860.

Twelve months after date we promise to pay to the order of ourselves, at the Bank of the Republic, thirty-eight hundred and two 76-100 dollars, value received.

LANES, BOYCE & Co."

The complaint alleges that the defendant indorsed the note for value, and delivered it so indorsed, and thereafter, and before this action, it lawfully came to the possession

Harden v. Boyce.

of the plaintiff for value, &c., and "that at maturity said note was duly presented for payment, but was not paid, and was thereupon duly protested for non-payment, of all which due notice was given to the defendant."

The answer admits the making of the note and the indorsement thereof by the defendant, but denies that such indorsement was for value, and alleges that such indorsement was for the accommodation of the makers, and puts in issue the allegations of the complaint as to the presentment, demand of payment and notice of non-payment to him. With the answer was served an affidavit, pursuant to the statute, denying that the defendant had ever received notice of the non-payment of the said note. Upon the trial, the only witness produced was Archibald S. Vanduzer, the notary, who presented the note for payment. He testified, that he was a notary public, and that in his capacity as such notary, on the 4th day of October, 1861, he presented the note in suit at the Bank of the Republic, where the same was made payable, and demanded payment, which was refused; whereupon he duly protested the same, and deposited in the post office notice to the indorser, the defendant, and prepaid the postage thereon, pursuant to law. It was admitted that at the time of the presentment of the note for payment, and of the depositing in the post office of the notice of protest testified to by the witness, the defendant was a resident of Greenville, in the State of South Carolina, and continued so to be at the time of the trial.

The plaintiff having rested his case, the defendant's counsel moved to dismiss the complaint on several grounds. The court, having stated that the question presented was too important to be decided hastily at circuit, in order to facilitate the presentation of the case to the general term, denied the motion; to which decision the defendant's counsel duly excepted. The jury, under the direction of the court, found a verdict for the plaintiff for \$5562.87;

Harden v. Boyce.

to which direction of the court the defendant's counsel also excepted. The court thereupon directed the exceptions to be heard in the first instance at the general term, and that the entry of judgment be meanwhile suspended.

B. H. Corbett, for the plaintiff.

The only question is : Was notice ever sent to the defendant, pursuant to the requirement of our statute?

I. The notary gave the proper notice; he did all the law required him to do.

II. For the manner of protesting, and notice how to be given, see 3 *R. S.* 71, *etc.*, 5th ed. *Laws of 1835*, ch. 141.

III. The right to serve by mail is extended by *Laws of 1857*, p. 839, ch. 416. *Laws of 1835*, p. 152, ch. 141.

J. Larocque, for the defendant.

I. The indorser of a promissory note contracts only that the note shall be duly honored, and that if it is not, and he has due notice of the dishonor, he will pay the amount. The holder is bound to exercise due diligence in giving notice to the indorser, if he intends to look to him for payment.

II. The question as to what is due notice, under ordinary circumstances, is now well settled. The result of the authorities is, that in order to charge the indorser, the holder of a note is bound, when there is a communication by mail between the places where the holder and indorser respectively reside, to dispatch the notice of dishonor by mail on the next business day after default is made in payment of it.

III. Delay in giving notice may be excused by certain causes not traceable to the neglect of the holder. Among such excusing causes is the breaking out of a war, blocking up the usual channels of communication, and preventing the transmission of the notice; but such delay is excusable so long only as the preventing cause continues,

Harden v. Boyce.

and the holder in such case is bound to give notice as soon as possible after the impediment is removed. (*Edwards on Bills and Notes*, pp. 458, 459, marg. *Chitty on Bills*, 330. *Hopkirk v. Page*, 2 *Brock*. 20-34.)

IV. As soon as a war is commenced, all trading, negotiation, communication or intercourse between the citizens of the respective belligerent powers, without the direct permission of government, is unlawful. (*Griswold v. Waddington*, 16 *John*. 438, and cases cited.)

V. On the 4th day of October, 1861, when, according to the evidence, a notice of the non-payment of the note in suit was deposited in the post office in the city of New York, addressed to the defendant, at his residence, in Greenville, in the State of South Carolina, open war was raging between the government of the United States and the States adhering to the said government on the one side, including the State of New York, and the so-called Confederate government, and the States adhering thereto, including the State of South Carolina, on the other, and there was no longer any actual mail communication between New York and South Carolina. Independently, therefore, of the express prohibition of intercourse by act of congress, to which attention will be hereafter called, all attempts at communication or intercourse between the citizens of the State of New York and citizens of the State of South Carolina, without the express permission of the government, were then unlawful. (*Griswold v. Waddington*, 16 *John*. 438. *The Rapid*, 8 *Cranch*, 161. *The Julia*, *Id.* 193.)

VI. Not only, however, was there then no permission for such intercourse or communication, but such intercourse and communication were then expressly prohibited and declared unlawful by act of congress of the United States, and the proclamation of the President, issued in conformity therewith. (*Act of April 13, 1861*, § 5. 12 *Stat.*

Harden v. Boyce.

at *Large*, p. 257. *Proc. of Pres.*, dated Aug. 16, 1861. 12 *Stat. at Large*, app. No. 9.)

VII. The deposit, therefore, in the post office at the city of New York, on October 4, 1861, of a notice of the non-payment of the note in suit, addressed to the defendant at Greenville, in the State of South Carolina, was not only a nullity, for the reason that there was then no mail service between the said States, but was an unlawful act under the rules of the common law, and expressly prohibited by the act of congress and proclamation above cited, and of no effect whatever. (*Act in relation to Postal Service*, 12 *U. S. Stat. at Large*, p. 177. *Order of Postm. Gen.* of 30th May, 1861.)

VIII. The holder of the note in suit having been prevented from giving to the defendant notice of non-payment, at the time when, under other circumstances, he would have been obliged to give such notice, by the existing hostilities and the prohibitory statute and proclamation cited above, was not thereby relieved from the obligation to give notice with reasonable diligence. The state of facts existing at the time of the maturity of the note, could only excuse delay in giving notice, so long as the preventing cause continued, and did not dispense with the necessity of notice. (*See authorities under third point.*)

IX. By a proclamation of the President, dated June 13, 1865, the restrictions theretofore imposed on intercourse in the territory of the United States east of the Mississippi river, were removed. It was then possible for the holder of the note in suit, and it became his duty, to give notice of non-payment to the defendant, if he intended to hold him on his contract as indorser. No such notice was, however, given, and, by the plaintiff's negligence, the defendant was discharged from all liability as indorser of the said note. (*Hopkirk v. Page*, 2 *Brook.* 34.)

X. The defendant was therefore entitled to a dismissal of the complaint, and the court below erred in denying the motion made for a dismissal, at the close of the evidence.

Harden v. Boyce.

XI. The defendant's exceptions to the decision of the court, denying the motion to dismiss, and directing a verdict, were both well taken, and the verdict should therefore be set aside, and a new trial ordered, with costs to the defendant.

By the Court, BRADY, J. At the time the notice of dishonor was deposited in the post office in this city, addressed to the defendant, at his residence in Greenville, South Carolina, that State, with others, had seceded from the United States; the federal representatives therein had either succumbed to the rebellious movement, or been supplanted; the political and judicial power of the federal government had been set at defiance, and the insurgents were in actual possession of the territory embraced within the State, by force of arms. The President, under the authority conferred by the act of congress passed July 13, 1861, (12 *Stat. at Large*, p. 257,) had declared that the inhabitants of that State and others were in a state of insurrection against the United States, and had proclaimed that all commercial communication between the citizens of that State and others named, and the citizens of the United States, was unlawful. (*Proclamation, app. No. 9, 12 Stat. at Large.*) The government established by the Confederate States was one called by publicists a government *de facto*, but which might, perhaps, be more aptly termed a government of paramount force, the existence of which was maintained by active military power within the territories, and against the rightful authority of an established and lawful government, and to that government, thus created, the rights and obligations of a belligerent were conceded in its military character, soon after the war began. (*Per Ch. J. Chase, in Thorington v. Smith and Hartley, decided Dec. 1868, 8 Wall. 1.*)

When a war is commenced between nations, it arrests, *eo instanti*, all commercial intercourse and voluntary com-

Harden v. Boyce.

munication with the enemy, without the permission of the government; and the citizens or subjects of one belligerent become the enemies of the other, and of all its citizens or subjects. (*Griswold v. Waddington*, 16 John. 438, and cases cited. *The Rapid*, 8 Cranch, 161. *The Julia*, Id. 193.) And these results of war, *inter gentes*, were substantially applied to the citizens of the Confederate States during the late conflict. The following cases establish the proposition that in the late rebellion there existed between the government of the United States and the Confederate States, a state of civil war in the sense of international law, which brought with it the common incidents of war, and arrested all commercial intercourse and communication between the citizens of those States, respectively. (*The Prize Cases*, 2 Blatch. 635. *The Venice*, 2 Wall. 258. *The Wm. Bagaly*, 5 id. 377. *Hanger v. Abbott*, 6 id. 532. *Allen v. Russell*, 12 Am. Law Reg. 362. *Billgay v. Branch*, 17 id. 33. *Coppell v. Hall*, 7 Wall. 555.) The existence and character of the hostilities mentioned, and the consequences flowing therefrom, rendered the attempted service of notice of protest on the defendant a nullity. The defendant's engagement was a conditional one, to be made absolute upon the observance of such formulæ as are prescribed by law, unless waived or rendered unnecessary by facts and circumstances attending the maturity, demand and refusal of payment recognized by commercial law. In this case, there was no pretense that notice of dishonor had been waived, or was necessary; and the defendant was therefore entitled to it. The plaintiff was under no obligation to send it, as long as the impediment occasioned by war existed. (*Edwards on Bills and Notes*, 458, 459. *Hopkirk v. Page*, 2 Brock. 20, 34.) It may be at least questionable whether he would be justified, after the President's proclamation, in thus communicating with an enemy. It was his duty to send it, however, when the interruption of intercourse ceased. If, at the time the notice was de-

Harden v. Boyce.

posited, the mail communication between the defendant's State and this was continued, it rested with him to show that fact, to overcome the presumption to the contrary, or, as held in the case of *Billgay v. Branch*, (*supra*), to have proven that the general usage required that the letter containing the notice should be preserved by the postmaster until the restoration of intercourse, and then forwarded to its destination. In that case, the notice of dishonor was deposited in the post office at New Orleans, in October, 1863, when that city was in possession of the federal forces, addressed to the defendant, then in a rebel State. By the act of congress passed February 28, 1861, the postmaster-general was authorized to discontinue the postal service on any route where it could not, in his opinion, be safely continued; and we are not going too far in presuming that the mail communication could not be safely carried on while the hostilities between the insurgents and the government of the United States continued, or that communication interdicted by law would not be permitted by the government without its permission. The plaintiff must be held to have known of the existing condition of the country, and the prohibition of intercourse. He could not, therefore, cast upon the government the burden of preserving his letter or its contents until the termination of hostilities; and it follows that when he deposited the notice he did not put it in such course of transportation and delivery as would accomplish the duty imposed on him by law. The verdict must, for these reasons, be set aside, and a new trial granted, costs to abide the event.

[NEW YORK GENERAL TERM, JANUARY 8, 1870. *Ingraham, Geo. G. Barnard and Brady, Justices.*]

GEORGE W. MILLER vs. JOHN P. WHITE and others.

When issues are formed, by the pleadings, testimony pertinent to such issues is admissible. Hence, if the plaintiff, in addition to the matters set forth in the complaint, testifies, upon a commission, as to matters not embraced in the complaint, but distinctly raised and presented as a defense by the answer, it cannot be held as error to admit the testimony.

If, in an action against the trustees of a corporation, to recover a debt owing by the corporation, because of a neglect to file a report as required by law, the defendants answer that their trusteeship ceased at a certain time, it is competent for the plaintiff to show that his claim accrued prior to that time. And if it be objected that the complaint does not allege that fact, it is sufficient to say that the answer first raised that question; and if it be a material allegation in the complaint, and was omitted therein, and not taken advantage of by demurrer, the court has ample powers to permit an amendment, before or after judgment.

Defendants objected, on the trial, to the introduction of a judgment roll in evidence, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The answers, which were a part of the judgment roll, showed that the defendants had been brought into court. *Held* that if the clerk of the court omitted to annex the summons to the judgment roll, as it was his duty to do, the omission would not deprive the prevailing party of his rights. And that with respect to the minutes of trial, inasmuch as the judgment roll showed a trial before the judge, without a jury, his findings in favor of the plaintiff, and directions for judgment, it appeared to meet the requirements of the Code, (§ 281;) except in respect to the summons.

And that as to its sufficiency, or the effect of any irregularity, the judgment roll was not a nullity.

In an action against trustees of a corporation, seeking to charge them personally with a debt of the corporation, because of the omission to make and file the annual report required by law, the plaintiff offered testimony establishing a thorough search in the proper county clerk's office, for such report, and an examination of records and indices in the usual and accustomed place for keeping such papers and for the making of entries of the filing thereof, and that no such paper, or the filing thereof, appeared, or could be ascertained upon such search, which was twice made. The defendants offered testimony going to show the preparation of a report, and that the same was handed to one of the officers of the company for filing; and one witness thought he saw it published in a newspaper. *Held* that the defendants' evidence did not meet the fact which the plaintiff's testimony tended to establish; and was not sufficient proof to go to a jury as to whether the report was in fact filed and published as required by the statute.

The settled principle is, that a creditor having once established his claim against a corporation, by judgment, shall not be compelled, in seeking a

Miller v. White.

remedy against stockholders or trustees, to re-establish the fact of original indebtedness.

The judgment he obtains against a corporation may be impeached for fraud or collusion, but not otherwise. And both stockholder and trustee may relinquish their positions and escape liability for future obligations; but they cannot thereby change the course of proceedings, or the rules of evidence, or their liability, as to obligations previously incurred by the corporation. Where the omission of a corporation to make the report required by law, and the trusteeship of the defendants, were concurrent in point of time, and the plaintiff's claim, for which he had previously recovered judgment against the corporation, accrued while the defendants were trustees; *Held* that the plaintiff was entitled to recover of the defendants the amount of such former judgment.

THIS action was brought by the plaintiff, a judgment creditor of the Gutta Percha Manufacturing Company, against the defendants, as trustees of said company, for the purpose of charging them personally, for the debt, because of the omission of the company to file an annual report as required by statute.

The complaint alleged that the Gutta Percha Manufacturing Company is, and during the years 1864, 1865 and 1866 was, a corporation, created by, and under the laws of the State of New York, and was organized March 2, 1859, pursuant to the act of February 17, 1848, "to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes." (*Laws of 1848, ch. 40.*) That on the 1st day of January, 1865, the said company was indebted unto the plaintiff. That in January, 1865, an action to recover said indebtedness was commenced in the Supreme Court, by the plaintiff, against said company. That a summons was duly served upon the president of said company. That the company duly appeared and answered, in the cause, and such proceedings were thereupon had that, on the 27th day of June, 1866, a judgment was duly rendered and entered in said action, in favor of the plaintiff, and against the said company, for the sum of \$24,734.62. That execution thereon was issued to the sheriff of the city and county of New

Miller v. White.

York, and returned wholly unsatisfied. That said judgment was wholly unpaid, and was in full force and owing by said company to the plaintiff, with interest. That the defendants Moores M. White, John P. White and Warren Lazelle were duly elected trustees of said corporation, in 1861, and with the exception of John P. White, had since continued to be and to serve as such, and still were, trustees thereof, and that John P. White continued as such trustee until ——— 1865. That the county of New York was the county in which said corporation was located, and in which its principal office had been, and in which its business had been carried on. That neither the said corporation, nor its trustees, nor did any of them, within twenty days from the 1st day of January, 1865, make, file or publish a report, as required by law, verified by the oath of the president and secretary thereof, and file the same, nor within twenty days from the 1st day of January, 1867; nor had they, or any of them, ever at any time, during the years 1865, 1866, 1867 or 1868, made or filed any such report as is required by law to be made, filed and published, within twenty days after the 1st day of January in each year. Wherefore the plaintiff demanded judgment against the defendants, jointly and severally, for said sum of \$24,734.62, with interest from the 27th of June, 1866, and costs.

The defendants, by their answer, admitted the formation of the Gutta Percha Manufacturing Company, as alleged in the complaint, but denied all the other allegations of the complaint. They denied that at the time of the recovery of the plaintiff's judgment against said company, the company was indebted to the plaintiff, and alleged that said judgment was recovered fraudulently and collusively; that the judgment was founded upon an illegal contract, &c.; and that on the 21st of April, 1865, the said company was duly dissolved, and ceased to exist, and became and still was, without any corporation or officers, and

Miller v. White.

nad performed no corporate acts. And the defendants denied that since the 16th day of February, 1865, they had been trustees of the said corporation. The defendant John P. White, for a separate answer, alleged that on the 16th day of February, 1865, he duly resigned the office of trustee of the company.

The defendant M. M. White, for a separate answer, alleged that he never acted as trustee of the company after the 16th of February, 1865, and that he never accepted any appointment or election as trustee after that time; that this action was commenced March 4, 1868, more than three years after the cause of action accrued.

The defendant Lazelle, also denied that he had been a trustee of the corporation since April 21, 1865.

On the trial, at the Kings circuit, in June, 1870, after the counsel for the plaintiff had opened the case to the jury, and before any evidence had been offered by the plaintiff, the counsel for the defendants moved the court to dismiss the complaint on the following grounds: "That said complaint does not state facts sufficient to constitute a cause of action. 1st. It does not set forth any original cause of action against the Gutta Percha Manufacturing Company. It does not state the amount of that claim, the time when it was contracted, or what it was for. 2d. It does not show any cause of action against the Gutta Percha Manufacturing Company."

The court denied the motion, and the defendants excepted.

The counsel for the defendants, in behalf of the defendant John P. White, moved to dismiss the complaint as to him, upon the grounds above stated, and also upon the additional ground that there was no allegation in the complaint that he was a trustee of the Gutta Percha Manufacturing Company after the 1st day of January, 1865; and that it did not allege any indebtedness to ex-

Miller v. White.

ist prior to that date. The court denied the motion, and the counsel excepted.

The plaintiff then offered in evidence the judgment roll in the case of George W. Miller against the Gutta Percha Manufacturing Company, filed June 27, 1866, for \$24,764.62. The counsel for the defendants objected to the admission of the judgment roll in evidence, on the grounds: "1st. That it is a judgment against another party than the defendants in this action, and it is not admissible against these defendants for any purpose whatever. 2d. That it appears by the roll itself, not to be such a judgment roll as is required by the Code; there being no summons or process annexed to, or forming part of the judgment roll. 3d. There is not any copy of the minutes of the trial, from the clerk of the court, showing when the trial took place, or the circumstances attending the trial. 4th. That the judgment roll itself does not show the indebtedness; what it was for; or what the findings of the court were, on trying the case. 5th. That there is no law requiring a judgment against the trustees."

The court overruled the objections, and admitted the judgment roll in evidence, and the defendants' counsel excepted.

At the close of the testimony, the court directed the jury to find a verdict for the plaintiff, for \$31,372, being the amount of the judgment in favor of the plaintiff against the Gutta Percha Manufacturing Company, and interest thereon, exclusive of the costs in that action embraced in that judgment.

The jury found a verdict accordingly; and from the judgment entered thereon, the defendants appealed

H. Sheldon, for the appellants.

L. A. Fuller, for the respondent.

Miller v. White.

By the Court, TAPPEN, J. The plaintiff recovered a judgment against the Gutta Percha Manufacturing Company, for the sum of \$24,734.62, June 27, 1866, and the same being unpaid after execution issued and returned wholly unsatisfied, the plaintiff brings this action against the defendants alleging that they were trustees of the company, and that the company neglected to file an annual report as required by the general act of February 17, 1848, and the acts amendatory thereof; and that therefore and by force of the statute, (§ 12,) the trustees became personally liable for the debts of the company then existing, and for all debts contracted prior to the making of such report.

It has been held that only those who are trustees when the debts are contracted, come within these terms. (*Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297.) And in determining that case it was held that three circumstances must concur in point of time to render a trustee liable. 1st. The evidence of the debt. 2d. The evidence of the default in making the report. 3d. And the trusteeship.

In the case at bar, the amount of debt is established by the judgment in favor of the plaintiff against the company, and the non-payment thereof is also proven. This branch of the case, and the sufficiency of the complaint, are fully discussed in the opinion delivered in this case at general term, and reported in 8 *Abbott, N. S.*, 46. The action was brought to trial at the Kings circuit, in June, 1870, and upon the evidence offered and admitted, the court directed a verdict in favor of the plaintiff. The testimony of the plaintiff, taken by commission in March, 1869, was offered and read in evidence. That testimony refers to the judgment, and states the facts out of which the indebtedness arose. The defendants' counsel objected to the admission of this evidence, upon various grounds, which are stated in the case. The chief objection appears to have been that these facts were not stated

Miller v. White.

in the complaint. The defendants had put in a very full answer, setting up several defenses, and the plaintiff had put in a reply. Certain issues were thus formed, and testimony pertinent to these issues was certainly admissible. In other words, if the plaintiff, in addition to the matters set forth in the complaint, was allowed to testify, upon commission, as to matters not embraced in the complaint, but distinctly raised and presented as a defense by the answer, it cannot be held as error to admit the testimony. The defendants had answered that the trusteeship ceased at a certain time; it was competent for the plaintiff to show that his claim had accrued prior to that time. And if it be said that the complaint did not allege the fact, it is sufficient to say that the answer first raised that question, and if it were a material allegation in the complaint and omitted therein, and not taken advantage of by demurrer, the court has ample power to permit an amendment before or after judgment. As to the practice on this point, see *Lounsbury v. Purdy*, (18 N. Y. 515.) The defendant objected to the introduction of the judgment roll, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The complaint and answer, a part of the judgment roll, and the decision of the judge before whom the action was tried, was included therein. The office of a summons is to bring parties into court. The judgment was not obtained by default for want of an answer. A very full answer was put in. The answer shows that the defendants had been brought into court. They did not appear, however, at the trial, and an inquest was taken against them. And if the clerk of the court did not annex the summons to the judgment roll, as is his duty, the omission will not deprive a prevailing party of his rights. (*Renouil v. Harris*, 2 Sandf. 641. *Earle v. Barnard*, 22 How. 437. *Hoffnung v. Grove*, 18 Abb. 14.)

With respect to the minutes of trial, the judgment roll

Miller v. White.

shows a trial before a judge, (a jury being waived;) his findings in favor of the plaintiff; and directions for judgment. The judgment roll, with the exception of the summons, appears to meet the requirements of the Code, section 281. And as to its sufficiency, or the effect of any irregularity, the judgment roll *is not a nullity*. (2 *Sandf.* 641. 4 *Denio*, 243. 1 *Duer*, 686.)

With respect to the actual filing of a report, the plaintiff offered testimony establishing a thorough search in the proper county clerk's office for the report required to be filed, and an examination of records and indices in the usual and accustomed place for keeping such papers, and for the making of entries of the filing thereof, and that no such papers, or the filing thereof, appeared or could be ascertained upon such search, which was twice made.

The defendants offered testimony going to show the preparation of a report, and that the same was handed to one of the officers of the company for filing; and one witness thinks he saw it published in a newspaper. The evidence does not meet the fact which the plaintiff's testimony tended to establish, and it is not sufficient proof to go to a jury as to whether the report was in fact filed and published as required by the statute; and no other proof was offered by the defendants to establish that fact.

It becomes important to determine the period of time when the defendants ceased to be trustees. There is no dispute but that they were, and continued to be, trustees during the twenty days subsequent to January 1, 1865, within which time the report was required to be made, published and filed, or in default thereof their liability attached.

The action brought by the plaintiff against the company, was commenced January, 1865, and the judgment recovered thereon June 27, 1866. In the present action the defendants set up in their answer that the company was duly dissolved, and ceased to exist on the 21st of April,

Miller v. White.

1865. The defendant J. P. White avers that he resigned the office of trustee on the 16th of February, 1865. The defendant M. M. White avers that he never acted as trustee after the same date; that he never accepted any appointment or election as trustee after that time; and that he was never so elected "after said 16th of February, or at any time after the 10th of March, 1865." The defendant Lazell avers that the company was dissolved on the 21st of April, 1865, and that it performed no corporate act after that period; and he denies that he has been a trustee since that date.

As to the defendant Moores M. White, it appears by his examination that he became a trustee at the organization of the company, (in 1863,) and continued such trustee as long as the company existed. There is no proof of the dissolution of the company; and on the trial it was stated by the defendants' counsel that they did not claim the company was dissolved legally, but merely that it ceased to do business. M. M. White also testified that he supposed the company's existence terminated in the early part of 1865. He also states that he was elected a trustee for one year from March, 1864, and that he never resigned. If he did not resign, and if no successor was elected to take his place, he continued to fill the office; or, in other words, to hold over; and it is claimed, on his behalf, that he ceased to be a trustee before the judgment was recovered against the company, and therefore that it could not be used as evidence against him. The same claim is now made on behalf of the defendant John P. White. This objection was not made as to either of them at the trial, when the judgment roll was introduced, and is not properly before the general term; but having been discussed there, a brief review of it will be proper here.

In *Moss v. Oakley*, (2 *Hill*, 265,) the defendant was a stockholder when the debt was contracted; the declaration did not aver that he so continued until the judgment

Miller v. White.

was recovered. On demurrer, the declaration was sustained, and the judgment held binding on the stockholder. In *Moss v. McCullough*, last reported in 7 Barb. 279, the litigation was of several years duration, and was twice before the court of last resort, and although the defendant was not a stockholder when the judgment was recovered against the company, it was held to bind him. And Judge Willard says, at page 293: "It matters not that the defendant had ceased to be a stockholder; the judgment was proper evidence," &c. The settled principle is, that a creditor having once established his claim against a corporation, by judgment, shall not be compelled, in seeking a remedy against stockholders or trustees, to establish the fact of original indebtedness. The judgment he obtains against a corporation, may be impeached for fraud or collusion, but not otherwise. And both stockholder and trustee may relinquish their positions, and escape liability for future obligations, but they cannot thereby change the course of proceedings, or the rules of evidence, or their liability as to obligations theretofore incurred by the corporation. A trustee is not only a stockholder, but he is an officer of the company, with peculiar means of controlling its affairs, and the reasons why he should be bound by the rules of evidence applicable to stockholders, do not require to be expressed here. They will be found very fully stated by Justice Woodruff in *Squires v. Brown*, (22 How. 35.)

It is not disputed that the omission (if any) to make the report, and the trusteeship of the defendants, were concurrent in point of time. It remains to be seen whether the plaintiff's claim for which he recovered judgment against the corporation, accrued during the trusteeship of the defendants. It will appear from the foregoing statement, that the defendant M. M. White at no time ceased to be a trustee, save by inaction. The question is not raised as to the defendant Lazell. The defendant J. P. White, on testifying, states that he resigned as trustee on the 16th

Miller v. White.

February, 1865, and both he and the defendant M. M. White insist that the claim accrued after that period. The evidence of the plaintiff shows that the debt accrued prior to 14th of February, 1865. His services commenced September, 1862; a contract in writing was made August 1, 1863; and he says that he continued in the employ of the company after 14th of February, 1865; that he received money from them after that date, and gave them credit for \$2772.50, an amount large enough to balance the services, and more.

On the part of the defendants, various questions were put to the witnesses examined on their part, as to whether the company owed the plaintiff anything, but the court properly overruled these questions, upon the ground that the answers would impeach the judgment, and that the judgment could not be so impeached. The questions were put in a variety of forms, but all to the same effect, and the court said: "You may show what, if any, of these services were rendered subsequent to February 16, 1865." Two exhibits were then offered in evidence by the defendants; the one being an account dated April 15, 1865, rendered to the company by the defendants, and the other a letter written by the plaintiff, dated May 22, 1865. These were received in evidence. This letter is a reply to, and contains extracts from, letters received by the plaintiff from the company's officers, and speaks of a shipment of 500 ponchos on the 30th of March, to make up a deficiency in former shipments of ponchos. The letter also speaks of commissions due him when the last voucher from the government was obtained, on the 16th of April, 1865; but none of this evidence meets the case on the part of the plaintiff, or tends to establish as a fact that the liability or debt of the company accrued after the defendant John P. White ceased to be a trustee. None of the books of the company were produced upon the trial, the defendants testifying that they could not find them; that the books

Miller v. White.

had passed into other hands; and that the company had sold out to a new company in the spring of 1865.

At the conclusion of the trial, the defendants claimed to go to the jury on the question of fact as to the filing of the report. The court refused this, and stated there was no question for the jury in the case.

An examination of the whole case, shows that there was no impeachment of the judgment, as to the amount due, nor any proper evidence offered to that end. Nor did the evidence, as a whole, raise any question of fact which could have been properly decided in favor of the defendants, either as to the making of a report, or as to the "time" when the plaintiff's claim accrued. The defendant's fifth request to charge went to all the defendants, and was clearly improper; no attempt was made to separate one of the defendants from the other in that request. The sixth request assumes a fact which was not established, and so with the subsequent requests; and the attention of the court was not called to any question arising on the evidence, as to the amount of indebtedness at the time of the alleged resignation of the defendant John P. White.

On the argument at general term, the defendants' counsel claimed that no debt existed in favor of the plaintiff, upon the written contract with the company, while John P. White was trustee. The concluding clause of the contract says "that when all bills certified shall have been received by them, they will pay a portion of them equal to ten per cent," &c. The claim of the plaintiff appears to have been for services commencing in September, 1862, and for other services commencing upon and under the contract, which is dated August 1, 1863, so that the services covered a considerable period of time. There was no claim that the company had not the benefit of the contract, and there were large sales of goods by the plaintiff for the account of the company, to the government, while the defendants were trustees. That provision of the contract

The People *v.* Hulbert.

simply points out how and when the plaintiff should be paid; it does nothing else. If the defendants were trustees when the goods were sold, and the services rendered, then they were trustees when the plaintiff's claim accrued. But no question presenting the case in this manner was mooted at the trial, and in that respect there is no ruling to be examined or corrected. As previously stated, the plaintiff, in his testimony, shows that he continued in the company's service after February 15, 1865, and received money thereafter, and had fully credited the company for all services after that period; and no books or accounts of the company were produced, and no competent proof offered to refute this.

The rulings of the court appear to have been proper on the whole case as presented, particularly as to the two defendants M. M. White and Lazell. Nor was there any error as to the defendant John P. White; and the judgment should be affirmed, with costs.

[SECOND DEPARTMENT, GENERAL TERM, at Brooklyn, January 10, 1871.
J. F. Barnard, P. J., and Gilbert and Tappan, Justices.]

THE PEOPLE, *ex rel.* John H. White and Samuel Freeman, *vs.*
JOHN C. HULBERT, County Judge of Saratoga County,
and others.

The right to appoint commissioners to issue the bonds of a town, to aid in the construction of a railroad, under the act of the legislature, of May 1869, (*Laws of 1869, ch. 907.*) depends upon the fact of a majority in number of the taxpayers of the town, owning or representing a majority in amount of taxable property within the limits of the town, petitioning the county judge for that purpose. The last assessment roll of the town is made the criterion for ascertaining that fact.

When a petition is presented to the county judge, for the appointment of commissioners under the act, the question to be determined by him is, whether or not the petition answers this requirement of the statute.

It is a valid objection to the petition, that a portion of the names upon it are

The People v. Hulbert.

signed as trustees, executors, administrators and guardians, respectively, and that it does not appear that such trustees &c. had authority to sign the petition; where the name signed to the petition as executor or administrator does not appear on the assessment roll, on which the assessment is to the "estate" of the testator or intestate, and the name of the person signing the petition as executor or administrator is omitted.

In such a case, it not appearing to the county judge that the signers are in fact what they assume to be, their signatures should be, and, unless they are necessary to make up the requisite majority, in number and amount, will be assumed to have been, excluded by the county judge.

It is not necessary that the petitioners should be owners of the property for which they are taxed. If they *represent* it, in any capacity, and are assessed on the tax list as so representing it, then they are taxpayers, and may become petitioners.

Thus, where one is assessed on the roll as *guardian*, he has the right to sign the petition as guardian, adding the estate which he represents. POTTER, J., dissented.

Where a religious society is assessed on the last assessment roll, and it is proved before the county judge that the petition was signed in its name, by officers of the society, in pursuance of a resolution of the board of trustees authorizing them so to sign, the society is entitled to be counted by the county judge, as a proper petitioner. POTTER, J., dissented.

A county judge does not, by signing a petition for bonding a town, in aid of the construction of a railroad, become incompetent to take cognizance of the proceeding.

A county judge, standing in the position of a taxpayer who has voted for the issuing of town bonds, is not thereby disqualified for counting the votes and ascertaining whether a majority, in number and amount of taxable property represented, has been given for the bonding of the town, or not.

If such majority has been given, the county judge has no power, in the premises, except to obey the statute, which makes it his duty, in such case, to appoint three commissioners to issue the bonds.

Upon a *certiorari* to a county judge, to review his proceedings upon a petition for bonding a town in aid of the construction of a railroad, it is not competent for the relators to bring in question the eligibility of the persons whom the county judge has selected as commissioners to issue bonds; where no such question is made by the affidavit or complaint on which the *certiorari* was issued, and the writ does not call for any return on which the question of the eligibility of the commissioners can be examined, and the return fails to show anything on that subject, except that the order or judgment of the county judge states that they are freeholders, taxpayers and residents of the town.

In the face of the decisions of the Court of Appeals in the *Bank of Rome v. The Village of Rome*, (18 N. Y. 89;) *Starrin v. The Town of Genoa*, (28 id. 489;) and *Gould v. The Town of Sterling*, (Id. 486,) it cannot be determined that

The People v. Hulbert.

the act of the legislature, of May 18, 1869, permitting municipal corporations to aid in the construction of railroads, (*Laws of 1869, ch. 907.*) is unconstitutional and void.

Where proceedings for the bonding of a town, instituted in 1870, were based upon the assessment roll of 1869, instead of that of 1870, but the evidence clearly showed that at the time the proofs were taken, the assessment roll of 1870 had not been completed; *Held* that the requirements of the statute had been complied with.

THE Saratoga, Schuylerville and Hoosac Tunnel Railroad Company was duly organized and incorporated the 4th day of April, 1870. This company was formed for the purpose of constructing, maintaining and operating a railroad for the conveyance of persons and property, for public use, from some convenient point in the village of Saratoga Springs, in the county of Saratoga, running east to Schuylerville, thence across the canal and Hudson river to the village of Greenwich, in the county of Washington, a distance of eighteen miles. Its capital stock was \$300,000. In the month of April, 1870, after this railroad company was thus formed, a petition was gotten up for the purpose of bonding the town of Saratoga Springs in aid of the construction of said railroad. This petition stated, in substance, that the said railroad company had been organized and incorporated, and the object and purpose thereof; that the signers of said petition were each taxpayers of the said town of Saratoga Springs; that their names appeared upon the last assessment roll of said town, as owning or representing a majority of the taxable property within the limits of said town, and they were a majority in number of the taxpayers on said roll. Said petition was addressed to the Hon. John C. Hulbert, county judge of the county of Saratoga, and referred to the general town-bonding act, (*Laws of 1869, ch. 907.*) and further stated that the petitioners, as such taxpayers, did thereby apply to said county judge, and desire that the bonds of the said town might be created and issued in the manner specified in said act, to the amount of \$100,000,

The People v. Hulbert.

and that the same, or the proceeds thereof, might be invested in the capital stock of the said railroad company, for the purpose of aiding it in the construction of said railroad, pursuant to the provisions and intent of said act. The said petition, after having been circulated and signed by the petitioners, was duly verified by the affidavit of George S. Batcheller, one of the petitioners, subscribed and sworn to on the 31st day of August, 1870, and was afterwards, and on the same 31st day of August, presented to the said county judge, and duly filed. Upon the presentation and filing of this petition, the said county judge made an order directing a notice to be published in the *Saratogian*, a newspaper published in Saratoga Springs, county of Saratoga, setting forth that on the 20th day of September, 1870, at 10 A. M., at his office in said town of Saratoga Springs, he would proceed to take proof of the facts set forth in said petition; which order was signed by the said judge. On the same day a notice was made and signed by him as county judge, for publication, pursuant to the said act and order. The said order and notice were both published twice in said *Saratogian*, the first publication having been on the 8th day of September, 1870, and the last on the 15th day of that month. Pursuant to such notice, the county judge attended at the time and place and for the purposes in said order and notice mentioned, to wit: On the 20th day of September, 1870, at 10 A. M., at his office, and proceeded to take the proofs of the facts set forth in said petition. Henry W. Merrill appeared as counsel for the petitioners, and Lemuel B. Pike appeared in behalf of the relator, Samuel Freeman, to oppose the application of the petitioners. L. Varney also appeared on said hearing, as counsel for the contestants.

There were forty-two petitions. They were all printed, except the signatures thereto, which were in manuscript. They all were addressed or captioned in the same words,

The People v. Hulbert.

and contained the same statements, and were all exactly alike, and formed, in fact, but one petition. This was done for the convenience of circulation and signing. These forty-two petitions were all annexed together before they were verified and presented to the county judge, as aforesaid. For the convenience of reference, and the taking of the proofs of the signatures thereto, respectively, the judge marked them with the letters of the alphabet, as "Paper A," "Paper B," &c., so far as such letters held out, and the residue were marked and designated as papers "A No. 1," "B No. 2," &c. They are all so designated and referred to in the evidence taken by the judge.

At said hearing before the county judge, the existence and incorporation of the Saratoga, Schuylerville and Hoo-sac Tunnel Railroad Company was duly proved, by a certified copy of the articles of association in the office of the Secretary of State. No objection to this proof was made. The assessment roll of the town of Saratoga Springs for the year 1869 was produced, identified and proved to be such, and was offered and received in evidence. It was also proved, by Charles A. Allen, one of the assessors of said town, that, even at the time of said hearing, the assessment roll for 1870 had not then been completed; that the twenty days' notice for hearing grievances had been given, but that said twenty days' notice had not then expired. Fred. N. Owen, the town clerk, testified that no assessment roll for the year 1870 had been filed in his office. The contestants offered no proof, and did not even attempt to prove, that the assessment roll of said town for the year 1870 had been made, completed, corrected, signed, verified or filed. It was claimed that there was then, in fact, no assessment roll of said town for the year 1870, within the intent and meaning of said bonding act, or of any statute.

The proof of the signatures of the petitioners was clear. The signature of each petitioner who was a taxpayer of

The People v. Hulbert.

said town, and whose name appeared upon the assessment roll of said town, for said year, was fully proved, with the exception of the nine names mentioned and excepted in the testimony of George S. Batcheller, which nine names were not counted in ascertaining the number of petitioners, nor were the sums set opposite their names, respectively, added into or made a part of the aggregate amount of property owned or represented by the other petitioners.

It appeared by the assessment roll in evidence, and by proof of actual count, that the whole number of the names of taxpayers on said roll was 1529. That the number of the petitioners whose names appear upon the petition, and whose names also appear upon said assessment roll, as taxpayers thereon, was 830, exclusive of those on the petition who were taxed for dogs only, and exclusive also of the nine names referred to in the testimony of George S. Batcheller. The aggregate amount of property assessed on the assessment roll, against all the taxpayers of the town, was \$2,318,170; and the aggregate amount of the property owned or represented by the said 830 petitioners, and assessed to them on the said roll, was \$1,189,394, the same being a majority of \$30,309, and a majority of petitioners of sixty-five names.

TABULAR STATEMENT.

The number of the petitioners whose signatures were proved, and who appeared on said roll as taxpayers of said town, exclusive of the nine excepted names, and exclusive, also, of those who were taxed for dogs only, was 830 names.

The whole number of taxpayers on said roll, including those who were taxed thereon for dogs, was 1529 names, one half of which is $764\frac{1}{2}$ “

Majority of such petitioners, ... $65\frac{1}{2}$ “

The aggregate amount of the whole assessed value of the

The People v. Hulbert.

property of said 830 petitioners, as set down on said roll,
was \$1,189,394

The whole assessed value of all the taxpayers
of said town, as set down on said roll, was
\$2,318,170, the one half of which was . . 1,159,085

Majority of property, ... 30,309

Majority of petitioners, 65½ names, and of property,
\$30,309.

The county judge, after hearing the proof, and after hearing counsel for the respective parties, did adjudge and determine that the petitioners were a majority of the taxpayers whose names appeared upon the last tax list or assessment roll of said town, and did own or represent a majority of the taxable property within the limits of said town, and did determine that said Saratoga, Schuylerville and Hoosac Tunnel Railroad Company was a railroad corporation duly organized and formed by virtue of the laws of the State; and did appoint and commission Henry W. Merrill, Aaron B. Olmstead, Edward R. Stevens, commissioners, with power and authority to create and issue the bonds of the said town of Saratoga Springs, to the amount of \$100,000, which sum did not exceed twenty per cent of the taxable property of said town, nor the amount set forth in said petition; and to invest the same, or the proceeds thereof, in the capital stock of the said railroad company, in conformity to the prayer of said petitioners, and the provisions of said chapter 907 of the laws of 1869, and the amendments of said law; which determination was made and dated September 22, 1870, and was signed by the county judge. Which determination, together with the petitions, orders, notices and proofs, were filed and entered of record in the clerk's office of the county of Saratoga, on the 29th day of September, 1870, as required by said act.

Upon an affidavit of the relators, sworn to on the 22d

The People v. Halbert.

of October, 1870, an order was made at a special term of the court, before Justice ROSEKRANS, on the 29th day of October, 1870, that a *certiorari* should issue in the name of the people, directed to said county judge, commanding him to make return of all orders, dockets, judgments, records and decisions, made or caused to be made by him in these proceedings, and the evidence had or given before him, to the general term of the Supreme Court. In pursuance of said order, a writ of *certiorari* was issued and tested the 29th day of October, 1870. In obedience to which writ the county judge made his return to the Supreme Court, which was filed in the office of the clerk of Saratoga county on the 31st day of December, 1870.

L. B. Pike and *L. Varney*, for the relator.

I. It is now well settled, that upon a *certiorari* the court may go beyond the inquiry whether the inferior tribunal had jurisdiction, and whether its proceedings and judgment were within the jurisdiction, and may examine the case upon the whole evidence to ascertain whether any error had been committed in the proceedings before such inferior tribunal. (*The People v. Board of Police*, 39 N. Y. 506. *Same v. Board of Assessors*, *Id.* 88. *Same v. Van Alstyne*, 32 Barb. 134. *Same v. Overseers of Ontario*, 15 *id.* 286, 293. *Same v. Lawrence*, 54 *id.* 589.)

II. These proceedings are founded on Session Laws of 1869, chapter 907. Section 1 says that whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax list or assessment roll of said corporation, as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by petition, verified by one of the petitioners, setting forth that they are such a majority of the taxpayers, and represent such a majority of taxable property, and

The People v. Hulbert.

that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, (but not to exceed twenty per cent of the whole amount of taxable property, as shown by said tax list and assessment roll,) and invest the same, or the proceeds thereof, in the stock or bonds of such railroad company in this State, as may be named in said petition, it shall be the duty of the said county judge, &c. The same section further provides that "any solvent moneyed manufacturing or other corporation or company, formed under the laws of this State, as being assessed on personal property therein, shall have all the rights and privileges under this act, so far as property representation is concerned, as other taxpayers. And the board of directors or trustees of any such corporation or company, may apply to the county judge, by petition, in the same manner as herein provided for other taxpayers."

It was a condition precedent to first show the legal existence of corporations or companies who have signed said petition, and that they were solvent. There is no proof of the existence of corporations or companies in this case.

By section 2 of said act, the county judge is required "to take proof as to the allegations in said petition," and if it shall appear satisfactorily to him that said petitioners do represent a majority of the taxpayers of said municipal corporation, as shown by the last preceding tax list or assessment roll, and represent a majority of the taxable property upon said last list or roll, he shall so adjudge and determine, and cause the same to be entered of record. And such judgment, and the record thereof, shall have the same force and effect as other judgments and records in courts of record in this State."

III. What competent proof is required before the county judge to authorize a judgment of \$100,000 against the town of Saratoga Springs, under this act? Can the court say that it is sufficient proof, to swear that the witness

The People v. Hulbert

saw a certain individual sign as president of a corporation, or saw some one sign for a company? Does that prove the existence of the corporation or company? Must they not show the existence of the company or corporation by competent and legal proof? And that the said company or corporation authorized the signing of the petition? This court cannot judicially determine, from this case, that there are companies or corporations in existence who claim to have petitioned in the case. The county judge was sitting as a court, heard objections and decided upon the same; swore witnesses and took their testimony, and adjudged and determined upon the case; and his judgment was entered of record. He was in no manner acting ministerially.

IV. Section 3 of said act requires the county judge to appoint and commission three persons who shall be freeholders and residents, and taxpayers, within the corporate limits of such corporation, to be commissioners. There is no evidence in the case to show that the commissioners thus appointed are freeholders. Proving that they were each taxpayers in 1869, in no manner proves that they were freeholders at the time of appointment.

Section 4 of the act requires the said commissioners to issue the bonds of said town, and if required by the petitioners, in their petition, to take stock or bonds of the railroad company, and to exchange for them at par, or they may sell the town bonds and invest the proceeds thereof in such stock or bonds of such railroad company.

By section 6, of said act, the bonds so issued are made a charge and lien upon the real and personal estate of the town of Saratoga Springs, and when they become due, shall be collected and paid in like manner as other debts and obligations and charges against said town.

Section 7 of said act requires that all moneys received from said commissioners, by said railroad company, shall

The People v. Hulbert.

be faithfully applied to the construction and equipment of said railroad, and for no other purpose.

V. There is nothing in this act, or its subsequent amendments, whereby the faithful performance of the commissioners and of the railroad company can be required, to carry out the provisions of the statute. If the commissioners issue the bonds to the amount of \$100,000, and deliver them to the railroad company, as required by this act, and take in exchange stock or bonds of said railroad, the town has no assurance that the road will ever be built, or that their bonds will be worth the paper which they are written upon. The company may never build the road, and there is no power, either by statute or common law, whereby they can be compelled; but the payment of the bonds of the town can be enforced, on becoming due, principal and interest; and where is the value, security and indemnity, which the town receives for its bonds? It is nothing more nor less than donating (by the legislature) this large sum of money, into a few individual hands, to be used by them at their will and caprice, and for the purpose of advancing their own private interest. There being no adequate remedy which the town can avail itself of, for compelling the faithful appropriation of the money, by these individuals, who exist merely under a legislative act, we say the law under which these proceedings are taken is unconstitutional and void. (*Sweet v. Hulbert*, 51 Barb. 312, and cases cited.) And any legislative enactment whereby taxes can be assessed through judicial proceeding, and judgment obtained, which is a charge and lien upon the real and personal property, for the purpose of paying the same into the hands of a railroad company for building and operating a railroad, when there is no provision made for the faithful appropriation of the money—indemnity or security given, nor any assurance that the stock of the railroad will be of any value—we say that the enactment is unconstitutional and void; it takes private property from

The People v. Hulbert.

individuals by legislative enactment, and gives it to this company without just compensation or its equivalent. This statute is clearly in conflict with the fundamental law of the constitution.

VI. Henry W. Merrill is one of the directors of said railroad company, and is also one of the stockholders of said company. E. R. Stevens is one of the stockholders. They are also two of the commissioners appointed by the county judge, with authority to create and issue the bonds of said town, and invest the same or the proceeds thereof in the capital stock of said railroad company. Can they act in a double capacity? Is it right that they should act as the agent of the town in issuing bonds, and they, themselves, become the purchasers of these bonds. *Kent*, (4 *Com.* 438,) says, that "a person cannot act as the agent for another, and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* The rule is founded on the danger of imposition and the presumption of the existence of fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exist, is deemed to be of itself sufficient to create the disqualification. This rule is well settled in the English and in our American jurisprudence."

The same person cannot act as agent for both parties in making a contract. A contract so made will not be enforced. (*N. Y. Cent. Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* 85. *Utica Ins. Co. v. Toledo Ins. Co.*, 17 *Barb.* 132.) A sub-agent of an insurance company cannot issue a policy or make any agreement on the part of the company to issue a policy to himself. (*Bentley v. Columbia Ins. Co.*, 17 *N. Y.* 421. *Dobson v. Racey*, 3 *Sandf. Ch.* 60. *Moore v. Moore*, 5 *N. Y.* 256.) They are the authorized

The People v. Hulbert.

agents of the town to create and issue the bonds of said town and invest the same, or the proceeds thereof, in the capital stock of the railroad company. They are made the guardians of the town in this transaction, and are called upon to watch with vigilance the interests and trusts committed to their charge, and especially when the bonds are sold to the railroad company. I ask how can they do so when they themselves are the purchasers? The court will not uphold such a proceeding. It is tainted with fraud. No matter what honest, honorable or high minded gentlemen they may be. No man, ever so pure, should ever occupy such a position.

VII. No person has authority to sign in a representative capacity, unless it is so expressly stated in the appointment, and no proof of this character was given in evidence. Guardians, executors, administrators, trustees of churches, &c., have no such power given to them. "The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase or sale, as to the subject of the trust." (2 *Kent's Com.* 228.) Trustees have no power permanently to convert the nature of the trust property by laying out money in the purchase of real estate, unless a special authority is conferred upon them by the trust instrument. (*Hill on Trustees*, §§ 377-379.) No trust instrument was shown, giving such power, or any power whatever, and yet the several guardians who have signed said petition seek to convert the real and personal property of their wards into the bonds of said railroad company, contrary to all precedent or right, and especially when one of them is a director and stockholder in the railroad company. (*See also Hill on Trustees*, 546, 568.) It cannot be claimed on this argument, by counsel for the railroad company, that those who signed in a representative capacity had the absolute right,

The People v. Hulbert.

on the ground that this railroad would greatly enhance the property of their *cestuis que trust*, when there is no security given by these commissioners to the town for the faithful application of the money, nor by the railroad company that they will ever build the road, or that the stock taken in exchange for bonds will be of par value, or any value. It is a rule in equity, that no act of the trustee shall prejudice the *cestui que trust*. "The law will not allow the trustees the least personal advantage from the trust estate; a rule which is universal and absolute, subject to no qualifications or exceptions, and holds those occupying fiduciary relations to the property to the strictest fairness and integrity towards their principals, and to prevent them from making use of their position to benefit themselves at the expense or disadvantage of their principals." (*Hill on Trustees*, p. 445. 2 *Washburn on Real Prop.* pp. 486, 448, 3d ed.) Deducting those who signed in a representative capacity, also the county judge, and the petitioners are clearly in the minority.

VIII. Trustees of churches are prohibited, under the statute, from selling or incumbering the real estate of the church, without first applying to the court, and obtaining an order for that purpose. (1 *R. S.* 1184, § 11.) Their duty is merely to manage the church for the purposes for which it was erected, and none other. They have no right to incumber the same or assist in it; and the signing of the petition by the trustees or president, even with the consent and direction of all the church members, in no manner grants to them authority to place an incumbrance upon the same.

IX. The bonding of the town should have been based upon the assessment roll of 1870. The law requires the assessment roll to be made out and completed, on or before the first day of August in every year. (1 *R. S.* 718, § 17, 4th ed.) The statute under which these proceedings are taken only allows petitioners to sign whose names ap-

The People v. Hulbert.

pear on the last assessment roll, before judgment is given for the commissioners to bond. Judgment was rendered in these proceedings on the 22d of September, 1870.

X. In proceedings created by special statute, the courts hold the parties to a strict requirement. (*See manuscript opinion of Court of Appeals, in The People ex rel. Averill v. The Adirondack Co.*)

XI. The county judge being a petitioner in his own right, as well as trustee, was disqualified from adjudicating upon the matters contained in the petition. Chap. 280, § 81, Session Laws of 1847, provides that "no judge of any court shall have a voice in the decision of any cause in the subject matter of which he is interested." "No judge of any court can sit as such in any cause to which he is a party," &c. (2 R. S. 463, § 2, 4th ed.) And these statutes are but declaratory of what the law has always been. (*Oakley v. Aspinwall*, 3 N. Y. 550.) It is a principle of the common law, that a judge has no power to decide his own case, or a case in which he is a party to the suit. (*Finch's Law*, 19. 4 Co. R. 118. *Wingate's Maxims*, 170.) The current of New York decisions is, that neither a judge or any other judicial officer, can sit where he is a party or interested, even in a case where he is a nominal party, as a public officer. (28 Barb. 503. 17 id. 410, 414. 41 id. 200, and cases cited.) It has been several times held that the chancellor might hear a case where his relatives were parties, if there were no other court where their rights could be determined, notwithstanding the statute. (*In the matter of the petition of Leefe and wife*, 2 Barb. Ch. 39. Id. 331.) But it has never been held, I apprehend, that he could sit in his own case. The decisions in the cases cited, when the chancellor heard cases contrary to the statute, was based not solely on the ground of necessity, but upon the constitutional provision giving exclusive appellate power to the chancellor in those cases; and he

The People v. Hulbert.

says: "The constitution must therefore control; as that is the paramount law." No such reason exists in this case. The constitution does not confer the power on the county judge in this instance; it is the legislature which says: "you shall have jurisdiction of this matter, but you must not sit where you are a party." These decisions, however, have not met with approval. Hurlburt, J., in *Oakley v. Aspinwall*, (3 N. Y. 550,) says: "It has been held by some modern judges to excuse them from determining upon matters and causes in which their relatives were parties or were interested. But it seems to me far better that causes as to which the sole judge of a court is presumed to be biased should remain undetermined until the legislature should provide an appropriate tribunal." (See also *Wash. Ins. Co. v. Price*, 1 *Hopkin's Ch.* 1.) The same principle applies to special proceedings as applies to cases; indeed most of the cases are in special proceedings when the law has been applied.

But the county judge is not the only officer before whom these proceedings might have been had. Laws of 1869, chapter 907, provides that application to bond the town may be made to the county judge of the county in which the corporation (railroad) is situated. No provision is made in the bill for application to any other officer. But section 30, subdivision 13 of the Code, provides that he may certify all actions or proceedings to the Supreme Court when he is thus disqualified from acting. It cannot be said that this only applies to proceedings in court; it must and does apply to all proceedings cognizable by the county judge, whether before him as county judge, or as judge of the county court.

XII. The writ of *certiorari* should be sustained, and the proceedings and judgment of the county judge should be reversed and set aside, and declared null and void, with costs.

The People v. Hulbert.

H. W. Merrill, in person, and for respondents.

A. B. Olmstead, in person, and for respondents.

Batcheller & Hill, for E. R. Stevens, and petitioners and railroad company.

I. In this town bonding proceeding the assessment roll is evidence of everything contained in it, and is as conclusive as is a regular judgment, upon the parties thereto. It is conclusive as to the number of taxpayers of the town; conclusive as to the aggregate of the taxable property in the town; conclusive that each and every person named on the tax list is a taxpayer of the town, and owns or represents the kind and amount of property set opposite his or her name, respectively, and the assessed value thereof; conclusive that each and every person named upon the roll is rightfully assessed in the capacity therein specified, whether in his own right or in his representative character, as executor, administrator, trustee or guardian; and conclusive that the persons named on the roll as executors, administrators, trustees or guardians, are such. The assessment roll is conclusive evidence that those named on the roll under the head of corporations, are corporations of the kind and character therein specified or indicated, and as such, are taxpayers of the town, and liable to be assessed in the amount set opposite each, respectively.

The assessment roll is not only thus affirmatively conclusive, but it is negatively so. For example: it is conclusive that any and every person in the town not named on it is not a taxpayer, and that no person is a taxpayer of the town in a capacity or character different from that specified on the roll. For example: a person who is assessed in his individual capacity only, is not a taxpayer in any representative capacity, and *vice versa*. And where a person is named and assessed on the roll in his individual and in a representative capacity, the roll is conclusive

The People v. Hulbert.

as to the amount set opposite his name in each capacity. The assessment roll is thus conclusive as evidence, not only on account of the high character of the document itself, made, as it is, under oath, and by regularly constituted officers, clothed with plenary and exclusive powers, but it is made so by the provisions of the general town bonding law itself. (*Laws of 1869, ch. 907, §§ 1, 2.*) This act makes the roll the basis of the determination of the county judge. It is documentary evidence, to which full faith and credit is to be given, and conclusive upon all parties to the proceedings had under said act, and cannot be added to, varied or contradicted by any evidence, *aliunde*.

II. It was unnecessary, under the provisions of this town bonding act, to give evidence, at the hearing before the county judge, proving that the petitioners signed the petition. The act does not require it to be done. The 2d section makes it the duty of the judge, at the time and place named in the published notice, to proceed to take proof as to the allegations in the petition. The allegations of this petition requiring proof were, 1st. That the Saratoga, Schuylerville and Hoosac Tunnel Railroad Company was a railroad corporation. 2d. That the petitioners were each taxpayers of the town of Saratoga Springs. 3d. That their names, respectively, appeared upon the last preceding assessment roll of said town, to wit, the assessment roll of 1869, as owning or representing a majority of the taxable property of said town. And 4th. That they were a majority in number of the taxpayers on said roll. These are all the allegations of the petition requiring proof, the residue of it being the prayer of the petitioners. It will be perceived that signing the petition is not an allegation requiring proof. And that no proof of the signatures to the petition is contemplated or required by the law, is pretty evident from the other parts of the second section of the act, for it goes on to say that "if it shall satisfac-

The People v. Hulbert.

torily appear to him (the judge) that the said petitioners," &c. "do represent a majority of the taxpayers of said town as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, he shall so adjudge and determine, and cause the same to be entered of record," and the next section simply provides for the appointment of commissioners by the judge. When these things are done, the whole duty of the county judge is performed. If the legislature had deemed it necessary or important to require the county judge to take proof of the signature of each petitioner, they would have said so expressly. Not having done so, the genuineness of the signatures of the petitioners is to be presumed.

III. At the close of the proofs before the county judge, the counsel for Samuel Freeman, one of the relators, made certain objections in writing. The 5th objection is in these words: "It does not appear that the pretended signers of said petition signed the same with their own proper signature, or where otherwise signed, that the persons signing had authority from the owner of the property." Now we submit that this objection is entirely too general and indefinite for any purpose. No one of the 900 names on the petition was pointed out to which the objection was applicable. The counsel for the petitioners could not know what names were objected to, and what not, nor could the judge; and it is a well settled rule that such general and indefinite objections will not be entertained in the court of review, and if there ever was a case where this rule should be adhered to and enforced, this is emphatically that case. If they had put their finger on the name or names of any of the petitioners, and said our objection here applies, an opportunity would have been given to the counsel for the petitioners to supply such proof.

Another answer to this objection is, that no proof of the signatures of the petitioners was necessary, and that their

The People v. Hulbert.

genuineness is presumed. Just one month after the determination of the county judge was made and signed, and twenty-three days after this determination, together with the petition and all the orders and testimony, had been filed and entered of record in the clerk's office, the relators, with the aid of counsel, were enabled to select out of the whole 900 names that appeared on the petition, thirteen names, which they ventured specifically to point out, and as to which they at that late day raised objections. These names were evidently all they could find, and as to all the rest (over 880) there were none to which they could find any objections. These thirteen names are as follows, as set down by relators :

1. John C. Shepherd, for Shepherd children.
2. Consent of the Congregational church, signed by S. B. Bushnell, president, L. S. Packard, clerk.
3. Eureka Spring Company, A. R. Dyett, president and trustee; Jacob Secord, trustee; H. Merrion, trustee.
4. S. B. Terwilliger, Baptist church; Waterbury, trustee, Baptist church.
5. William M. Weibelzdele, by Julia M. Weibelzdele, administratrix.
6. E. R. Waterbury, executor of C. A. Burnett estate.
7. Red Spring Company.
8. R. Hathaway, administrator of estate of Nelson Burnham.
9. Saratoga A Spring Company.
10. Elvira Putnam, administratrix.
11. George S. Batcheller, executor and guardian, Cook estate.
12. John C. Hulbert; John C. Hulbert, guardian.
13. John Westfall, W. M. S.

We submit the following comments respecting these thirteen names: The first name, "John C. Shepherd, for Shepherd children," is nowhere on the assessment roll; the term, Shepherd children, is on the roll, but John C.

The People v. Hulbert.

Shepherd is not. He, not being a taxpayer on the tax list, was not counted in as one of the taxpaying petitioners; nor was the term, Shepherd children, counted; nor was any part of the \$2000 assessed to Shepherd children reckoned as any part of the taxable property represented by the taxpaying petitioners. This is true in point of fact; and such is the presumption to be drawn from the facts. There is no evidence that the county judge did count this as one of the names of the taxpayers on the petition, or that he reckoned in the \$2000. He did, in fact, throw both out as above stated. And we respectfully insist that the relators must affirmatively show that this name was counted in, and the \$2000 allowed by the judge, before they can predicate error on it. This they have not done, and cannot do.

The second name in this list of thirteen is "Consent of the Congregational church." The words, "Congregational church," are not on the petition, nor are they on the assessment roll. And it is not very probable the judge counted any name which was not on either the petition or roll. This technical answer is entirely allowable to a technical objection. Upon the merits, it is true that the name, "Congregational Society," is on the tax list, and the name, "First Congregational Society," is on the petition, and was placed there by authority of the board of trustees, under the corporate seal of the society. Under these facts, we insist that the Congregational Society was rightfully a petitioner, and that the same was placed on the petition by unquestionable authority, and comes directly within the letter, spirit and intent of section 1, chapter 907, of the Laws of 1869. This section says that "any solvent moneyed, manufacturing, or other corporation or company, formed under the laws of this State, and being assessed on real or personal property therein, shall have all the rights and privileges under this act, so far as property representation is concerned, as other taxpayers." "And the board of directors or trustees of any such corporation or com-

The People v. Hulbert.

pany may apply to the county judge, by petition, in the same manner as herein provided for other taxpayers." This language is clear and unmistakable. It embraces all corporations having property on which they are assessed, and enables them to petition the same as any other taxpayers. It is an enabling statute, and, as such, is to be liberally construed, and we respectfully submit that it cannot be so construed as to exclude religious corporations, without a manifest violation of both its letter and spirit.

The third name specified is the "Eureka Spring Company." There is direct evidence that this name was not counted, nor was the \$5000, set opposite this name on the assessment roll, reckoned in, or made any part of the majority of the taxable property represented by the petitioners, but was expressly excepted out. On reviewing the subject, we are of the opinion that this company should have been counted as one petitioner, and the \$5000 reckoned in. The company was on the tax list. The president and trustees signed the petition. It was signed in this form, "Eureka Spring Company, A. P. Dyett, president and trustee; Mary Girard, Cynthia A. Childs, Mary Gierdz; Jacob Pecase, trustee Eureka Spring Company, H. Morrison, trustee Eureka Spring Company. It was a corporation, and was brought within the spirit and intent of the provision contained in the first section of the town bonding act, allowing corporations to become petitioners. If this be so, it was an error to reject it, but it was an error of which the relators certainly cannot complain.

The fourth name in this list is set down by the relators as follows:

"S. B. Terwilliger, Baptist church."

"Waterbury, trustee, Baptist church."

On the petition, it is thus set down:

"S. B. Terwilliger, } Baptist church."
 "W. Waterbury, }

It is on the assessment roll, "Baptist church," \$740.

The People v. Hulbert.

The signatures were proved. The "Baptist church" was a religious corporation. It was on the assessment roll, had property, for which it was assessed, was properly placed on the petition, and was a competent petitioner under the act. We refer to our observations respecting the Congregational Society as applicable to the Baptist church. Whether the judge reckoned in the \$740 assessed to this Baptist church, or not, does not appear from his return; and we insist that, as a matter of law, the relators must make it to affirmatively appear on the record that this "Baptist church" was counted in as one making up the majority of petitioners, and that this sum of \$740 was reckoned in and made a part of the majority of the taxable property, before they can predicate error. They cannot base error upon a mere assumption of a fact which does not appear on the record. Every presumption is in favor of the correctness of the determination of the county judge.

The fifth name on this list is set down by the relators as follows: "William M. Weibelzdle by Julia M. Weibelzdle, administratrix." This name is not on the petition. The only name on the petition which approximates to it in spelling or substance is "Mrs. Wm. M. Weibelzahl, administratrix." And it is quite impossible for this court to determine whether the two names mean one and the same person, or two different persons. Besides, the marked difference in the autography of the surnames, the words "William M. Weibelzdle by Julia" do not appear in the petition, and the natural inference is that the relators have got some other name, from some source or other. On the assessment roll there is a name as follows: "Weibelzahl, Mrs. Wm., land, \$460." This is the same name as that in the petition, except that the word "administratrix" is subjoined. It is pretty evident that the name in the roll and that in the petition applied to, and meant, one and the same person, and that as she could not be assessed for land as administratrix, the addition of that

The People v. Hulbert.

term to her name was mere surplusage, or simply *descriptio personæ*; if the judge so found, from the evidence, he undoubtedly gave effect to the intent of the parties. But it does not appear what he did do respecting it. The only thing manifest is, that there was and really could not be any error about it affecting the merits of the case, or his final determination of the matter.

The sixth name is set down in the affidavit of the relators as follows: "E. R. Waterbury, executor of C. A. Burnett estate." This name also does not appear on the petition, except as follows: "E. R. Waterbury, executor." "E. R. Waterbury, executor" does not appear on the tax list, and of course no account of his name as executor was made. He does appear in his individual capacity on the tax list and petition, and as such was undoubtedly reckoned in, and not otherwise.

The seventh name in this list, mentioned in the affidavit of the relators, is the "Red Spring Company." The name Red Spring Co. does appear in the petition, and also on the roll, and is assessed \$560. The name was proved, but what the judge did with it does not appear. It is to be presumed, however, that he made such a disposition of it as the evidence warranted. On the hearing, no specific objection to it was made by the relators' counsel. If any objection had been made, proof might have been supplied, if it was defective. It was not a corporation.

The eighth name is stated, in the affidavit of the relators, as follows: "R. Hathaway, administrator, estate of Nelson Burnham." This name does not appear on the petition or tax list.

The ninth name specified in the relators' affidavit is Saratoga A Spring Company. This name appears on the petition, but there was no sufficient proof that it was placed there by competent authority, and it was not claimed by the counsel for the petitioners, on the hearing, as one of the petitioners, but was in fact disclaimed. The testimony

The People v. Hulbert.

of George S. Batcheller and of W. W. Worden, introduced on behalf of the petitioners, shows that it was excepted out, and not counted in among the names of the petitioners, nor was the amount, \$700, assessed to it, reckoned in. It was wholly rejected. And the affidavit of the relators, that it and the Eureka Spring Co. were "included in the aggregate to obtain a majority of the taxable property of the town," was, to say the very least of it, quite inexact.

The tenth name is Elvira Putnam, administratrix. Her name does appear on the tax list, in her individual capacity, but not as administratrix, and it is to be presumed that she was not counted as a taxpayer petitioner, certainly not as administratrix.

The eleventh name is that of "George S. Batcheller, executor and guardian of Cook estate." This name, George S. Batcheller, appears on the petition, assessment \$5275. He also appears on the assessment roll as follows: "George S. Batcheller, guardian," assessment, "\$6666." It also appeared in evidence that he represented the Cook estate as guardian and executor; that he was the sole executor of the estate, with power of sale of real estate under the will; that nearly the whole estate is personal property, and that all of the real estate is located in the town of Saratoga Springs, except a small mission chapel, built by Mr. Cook, and located at Ballston Spa, N. Y. On the trial no specific objection was made to the allowance of the assessment against him as guardian. But after the evidence was closed, the contestants' counsel made a general objection that it did not appear that such persons as signed said petition as executors, guardians, or other trustees, had any power to sign, so as to bind their *cestuis que trust* or their estate. This objection is repeated by the relators. The answers to this objection are two, at least. The town bonding act itself gives them this

The People v. Hulbert.

power. The language of the first section of the act is express. It says: "Whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax list or roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge 'by petition verified, setting forth,' &c., it shall be the duty of said county judge to order," &c. (*Laws of 1869, ch. 907, § 1.*) It will be observed that the language of this section embraces all taxpayers whose names are on the last assessment roll of the town, and excludes none; and to make the intent to include all, still more certain, it says all taxpayers "owning or representing" a majority of the taxable property, evidently intending to clothe all taxpayers, as well those owning taxable property in their own right, as those who represent the taxable property in the right of others, such as guardians, executors and other trustees, with the power to petition for the bonding of the town. Persons thus taxed and representing property are placed, by this act, upon the same level with those who own and are assessed in their own right. It gives those representing property as guardians, trustees and executors, authority to sign a bonding petition, if they, in the exercise of their judgment, see fit to exercise it. We maintain that a guardian or trustee, who represents taxable property in the town, and who is placed on the assessment roll as such a taxpayer, has the right, independent of said act, to sign such a petition, provided he, in the exercise of a sound discretion, deems it expedient and for the benefit of the estate he represents, to do so. And if he does so sign, the same is effective and binding, so far as the bonding proceedings and the public are concerned; and it does not lay in the mouth of an entire stranger or any number of strangers to such estate, who have no interest in or control over

The People v. Hulbert.

it, to object to such signing. Such guardian or trustee is only answerable for such an exercise of his discretionary power when he is called upon by his ward to account for his acts and doings in the regularly constituted tribunals having jurisdiction in such matters. He is then, and then only, responsible for the execution of his trust. We know of no law which requires or allows the relators in this case to sit in judgment over the different guardians and trustees of this town.

When the guardians, executors and trustees, who have signed this petition, shall be called into court by their wards and principals, to account for their acts, they will cheerfully respond, and it may turn out that their acts and efforts in this behalf will prove to be so beneficial to their estates that they will cheerfully and thankfully sanction and ratify the same. We believe that will be the case in every instance. But if it shall eventuate otherwise, these guardians and trustees will alone be held responsible.

The twelfth name is "John C. Hulbert; John C. Hulbert guardian." His name appears on the petition and also on the assessment roll. He is assessed in his own right \$10,725, and as guardian \$2000. The same points and observations made respecting George S. Batcheller, guardian, are applicable to John C. Hulbert, guardian, and we desire it to be so considered. We wish to add the single remark, that the fact of his signing said petition, both in his individual and representative capacity, shows how thorough were his convictions as to his right and power to sign the same.

The thirteenth and last name of this list of thirteen is, as stated by the relators, "John Westfall, W. M. S." The name "John Westfall" is on the petition, and is also on the assessment roll. Assessment \$360. William M. Searing testified: "Mr. John Westfall authorized me to sign his name to the petition, and I signed John Westfall, as

The People v. Hulbert.

appears on said petition." Mr. Searing put the letters "W. M. S." in pencil, to the name, the same being the initials of his own name, simply as a memorandum to show how the name was placed on the petition, and to aid in getting proofs. We perceive no objection to John Westfall as a petitioner.

These are all the names that the relators have pointed out as in their opinion objectionable. Had they found others they most certainly would have mentioned them; and the fact that they have not done so, is of itself, a tacit admission by them that there is no objection worth mentioning to any others of the 900 names on the petition. The facts and proofs in the case go to show that there were no others of the petitioners to whom any objections were or could be made. These, aside from what can be even plausibly claimed as to the thirteen specified names, were a large majority of the taxpayers on the tax list, and owned or represented a large majority of the taxable property of the town. And it would not change the result in the least, if everything should be conceded to the relators which they can, with any show of reason or argument, claim as to these thirteen names, in respect to the amount of property represented by the petitioners, and the number of petitioners.

The court will, of course, understand that we do not, for one moment, or for any purpose, admit by this, that the objections of the relators are valid as to any of these thirteen names; on the contrary, we insist, as we have before endeavored to show, that the objections as to them are untenable; and we also claim that not one dollar can or ought to be deducted from the said \$30,309 majority; and that the closest examination and figuring that the facts of the case will admit of, will tend materially to increase that majority rather than diminish it, and will also increase the majority of names instead of diminishing them.

The People v. Hulbert.

IV. The act under which these proceedings were had, (*Laws of 1869, ch. 907*), is constitutional and valid. Precisely the same questions have repeatedly been passed upon by the Court of Appeals, and the law sustained. (*Bank of Rome v. Village of Rome*, 18 N. Y. 38. *Starin v. The town of Genoa*, 23 id. 439, 456.)

V. The county judge had jurisdiction of the matter. 1. He was not disqualified on account of interest, from entertaining the proceedings. The statute (which is declaratory of the common law) disqualifying a judge from acting in any case, reads: "No judge of any court can sit as such in any cause to which he is a party, or in which he is interested." This contemplates a judicial cause, where there is an action between parties, and only applies to judges of courts. (*Bank of Lansingburgh v. McKie*, 7 How. 369. *The People v. Wheeler*, 21 N. Y. 86.) This was not an action in a court; it was simply and purely a statutory proceeding before John C. Hulbert. His interest was too remote and contingent to disqualify him, even if he had been sitting in court on the trial of an action at law. He undoubtedly felt an interest in the question, but he had no direct pecuniary interest in the event of the proceeding, such as to render him, as judge, disqualified to sit. But he did not sit as judge. And as to his being a party to the proceeding, he was a party to it in about the same sense that he is a party to every action and proceeding prosecuted or defended in the name of the people of the State of New York. 2. But he did not sit judicially, as judge, in this proceeding, and hence the disqualifying statute did not apply to him, either in point of interest or as a party. The duties of county judge, under this statute, are not to dispense justice between man and man, but an act of public administration, though requiring the exercise of judgment, and are analogous to the administrative duties of the assessors of towns, commissioners of highways, town auditors, inspectors of elec-

The People v. Hulbert.

tions and county canvassers, &c. In the case of assessors, they have some judicial duties to perform in passing upon the value of real and personal property of the town in which they are designated to act, not only in relation to the estates of others, but of their own and their kindred. Commissioners of highways also have similar judicial duties to perform; they must pass upon all applications for the laying out or the discontinuing of highways over the lands belonging to themselves as well as to others; they must also "ascertain, estimate and assess the highway labor to be performed in their town," not only upon the persons and property of others in the town, but themselves, thus actually sitting in judgment upon their own rights and direct interest; and in the case of town auditors, they sit in judgment upon the claims presented against the town, decide upon the legality of the same, and the amount to be allowed, and until a recent date, passed upon their own accounts; they being the only tribunal to examine and pass upon the same. In the case of inspectors of election, they determine the qualification of voters, and decide upon their own qualifications, as well as upon others; they also determine the question who is elected, by counting their own ballots with those cast by others; and who ever thought for a moment to question their right to do so? The judicial duties of the assessor, commissioner of highways, town auditor and inspectors of election, here enumerated, are greater, and more directly affect the parties in their individual interest, than the case before us. In this case the counsel for the relators say the county judge signed the petition directed to himself for his own determination. In reply, we say that the town auditors present their own account to themselves (or in other words petition themselves) to be acted upon and by them determined; the assessors petition themselves to have the values of their own estates determined; and the inspector of election who may be one of the candidates

The People v. Hulbert.

being voted for, for office, votes for himself; and he canvasses the ballots, and from such canvass determines his own election or defeat. What farther, or in what more direct manner, does the county judge, in the case at bar, act in a judicial capacity upon his own petition, or sit in judgment upon his own rights. If his name had not appeared upon the petition, his duty would have been the same in relation to his representation of property upon the assessment roll; his name, and amount of property then appearing, would have been by him counted in the aggregate against the proposed bonding, instead of for the same, which is but a ministerial act, instead of a judicial one; so that in any event he would have been a party to the proceeding. Suppose that the legislature had enacted that the question should have been determined by ballot, those voting only whose names appeared upon the last assessment roll as taxpayers in said town, and the county judge was designated as the person to determine who were qualified to vote, and canvass such votes and determine the result. Could it be maintained for a moment, that he, in common with the rest, would not be qualified to cast his ballot in favor of, or against, the proposition, and if he did, would render the proceeding void, in direct opposition to the power the statute expressly conferred upon him.

In the case of the *Bank of Rome v. Village of Rome*, (18 N. Y. 38,) the question was determined by ballot. The president and trustees were to canvass the vote and certify the result to the clerk of the county. No one suggested that they were not qualified to act as such canvassers, or to cast their ballot for or against the project. Does it disqualify a person from acting as such canvasser because he acts as county judge in other and different proceedings? When the legislature designated the county judge as the person before whom the proceedings should be had, it used the term only as a description of a person, and not

The People v. Hulbert.

as a court or the judge of a court. 3. The effect of the action of the county judge, under the provisions of this act, is that the town determined to exercise a power which the legislature granted them, which they did not possess before. (23 N. Y. 446.) It determines an event only, and in no way determines any pecuniary question in which he is interested; it determines only a question of fact, that the towns may exercise the right which has been conferred upon them; in which question every other person residing within the corporation is equally interested. The prohibition of the Revised Statutes does not extend to cases where the interest is simply in some question of law; the statute stops short of that. (*The People v. Edmonds*, 15 Barb. 530.) 4. In the statute under discussion, jurisdiction of the matter is conferred exclusively upon one person—the county judge. The disqualifying statute does not apply to a judge of the court having exclusive jurisdiction of the matter. (17 Barb. 424. 5 Paige, 489. 2 Barb. Ch. 38.) 5. The disability of the judge of the court to sit in a cause in which he is interested, is statutory, and not constitutional; there is no prohibition of the legislature from conferring the right upon any judge to sit in a cause in which he is interested. 6. We submit that the duties to be performed by the judge under this town bonding act are ministerial, and not strictly judicial in their character. At most they were only semi-judicial. The questions for him to pass upon were matters of fact, not questions of law. He simply determined the three facts, whether the petitioners were taxpayers of the town, and whether they were a majority of the taxpayers, and owned or represented a majority of the taxable property of the town. One of these facts was to be determined by an inspection of the petition and the assessment roll, and the other two by adding up and subtracting names, and adding up the sums assessed on the roll to the petitioners, and subtracting the amount from the whole amount of

The People v. Hulbert.

the taxable property of the town as set down on the roll. These duties do not partake as much of a judicial nature as do the duties of assessors, town auditors, highway commissioners and inspectors of elections. These duties might all have been conferred upon and performed by the supervisor or assessor of the town, or by any other man of the county of ordinary integrity and ability, provided the legislature had so directed. So that it will be perceived that there is not anything in the nature of the duties to be performed which rendered it necessary for the legislature to designate the county judge to perform them. The legislature named the county judge, not as a judge, nor because he was judge, but simply as a fit and proper person to discharge a ministerial, or at most only a semi-judicial, duty. 7. The act does not contemplate that there can be any disability of the county judge, for it makes no provision whereby the petitioners of the town where the judge resides, can apply to any other judge, person, officer or tribunal; and to hold the judge disqualified to act, would effectually prevent the taxpayers of the town from availing themselves of the benefits of the law. It would work a denial of justice to the town of Saratoga Springs; and not only to the taxpayers of that town, but to the taxpayers of every town of the State to which the acts extends, and in which a county judge resides. Such could not have been the intention of the legislature, and we are satisfied that such is not the legal effect of this enactment of theirs, and that it properly cannot, and ought not to, have any such construction put upon it by the court.

PARKER, J. On the 31st day of August, 1870, certain taxpayers of the town of Saratoga Springs, applied, by petition, to the defendant Hulbert, county judge of Saratoga county, (under the act of May 18th, 1869, chapter 907, permitting municipal corporations to aid in the con-

The People v. Hulbert.

struction of railroads,) signifying their desire that the bonds of said town might be created and issued to the amount of \$100,000, and that such bonds or their proceeds might be invested in the capital stock of the Saratoga, Schuylerville and Hoosac Tunnel Railroad Company, for the purpose of aiding said company in the construction of its railroad.

The petition sets forth the fact of the organization of said company; that each of the petitioners is a taxpayer of said town, whose name appears as such upon the last assessment roll of said town; that said petitioners are, in the aggregate, a majority in number of the taxpayers on the said assessment roll, and own or represent a majority of the taxable property within the limits of the said town. The petition was duly verified by one of the petitioners. Upon the presentation of the petition, on the day aforesaid, the county judge made an order requiring notice to be forthwith published in a newspaper published in said county, setting forth that on the 20th day of September, 1870, at 10 o'clock A. M., at his office in Saratoga Springs, he would proceed to take proof of the facts set forth in the petition, as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them. At the time and place so appointed, he did attend, and the petitioners, by their counsel, also appeared, and one of the relators also appeared by counsel, to oppose said application. Proofs of the publication of the notice, as ordered, and of the facts set forth in the petition, were thereupon taken; and after hearing the proofs and the objections made thereto, by the relators' counsel, the county judge appointed and commissioned Henry W. Merrill, Aaron B. Olmstead and Edward R. Stevens, commissioners, with full power and authority to create and issue the bonds of said town of Saratoga Springs. The relators sued out a *certiorari*, to bring the proceedings before this court for re-

The People *v.* Hulbert.

view, and the case now stands before us for review upon return to the writ.

The right to appoint commissioners to issue the bonds of a town, to aid in the construction of a railroad, under the said act, depends upon the fact of a majority in number of the taxpayers of the town, owning or representing a majority in amount of the taxable property within the limits of the town, petitioning the county judge for that purpose. The last assessment roll of the town is made the criterion for ascertaining such fact. The question to be determined, then, by the county judge, was, whether or not the petition presented to him answered this requirement of the statute.

It is not denied by the relators, that the names upon the petition were a majority in number of those upon the assessment roll; nor is it denied that the persons whose names are signed to the petition own or represent a majority, in amount, of the taxable property within the town; but, it is stated that a portion of the names upon the petition are signed as trustees, executors, administrators and guardians, respectively; also that the name of John C. Hulbert, county judge, before whom the proceeding was had, was one of the names upon the petition; that it did not appear that such trustees, executors, administrators and guardians, had authority to sign the petition; and it is insisted that those, together with the name of the county judge, should be excluded; and that if they are so excluded, the remaining names will not represent a majority, in amount, of the taxable property of the town. It appears, from the evidence produced to the county judge, at the hearing, that the whole number of taxpayers, whose names appear upon the last assessment roll of the town, was 1529, and that of those 830 are signed to the petition; that the aggregate amount of assessments on the roll was \$2,318,170, of which amount the sum of \$1,189,394 was assessed against the petitioners. Half the number of

The People v. Hulbert.

taxpayers is 764 $\frac{1}{2}$, so that there is a majority of 65 in the number of the petitioners. Half the amount of the assessments on the roll is \$1,159,085. There is, then, a majority in amount, represented by the names on the petition, of \$30,309. The relators claim that the aggregate sum of \$34,551 of the amount represented by the petitioners, is represented by trustees, &c., and by the county judge, as above stated, and that this sum being deducted, leaves the amount represented by the petitioners \$4242 less than half the amount upon the assessment roll, so that the petitioners fail of a majority, and do not therefore come within the statute.

In regard to a portion of the names objected to, I think the objection well taken, inasmuch as the name signed to the petition as executor or administrator, does not appear on the assessment roll, where the assessment is to the "estate" of the testator or intestate, and the name of the person signing the petition as executor or administrator is omitted. In such cases, it not appearing to the county judge that the signers are in fact what they assume to be, their signatures should have been, and unless they are necessary to make up the requisite majority, in number and amount, we are to assume, were excluded by the county judge. Those objected to, and in regard to whom I think the objection sustainable, are J. C. Shepherd, for Shepherd children; Terwilliger and Waterbury, for Baptist church; Mrs. Weibelzall, administratrix; Waterbury, executor of Buell's estate; Holloway, administrator of Burnham's estate; Elvira Putnam, executrix of W. Putnam's estate; and B. Thrasher, guardian of S. H. Barrett's estate. These, together, represent the sum of \$5760. The residue of the relators' list of names objected to, I think, are properly on the petition. The first of these is George S. Batcheller, executor and guardian of the Cook estate. This name appears on the roll in this form: "George S. Batcheller, guardian." He was called as a witness, and

The People v. Hulbert.

testified that he was sole executor of the Cook estate, which was nearly all personal property. Being assessed on the roll as guardian, he had the right to sign the petition as guardian, which he did, adding the estate which he represented. The act authorizes persons whose names appear on the last assessment roll as owning or *representing* taxable property, to become petitioners. The language is: "Whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax list or assessment roll of said corporation, as owning or *representing* a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by *petition*, verified," &c. It is not necessary that the petitioners should be owners of the property for which they are taxed. If they *represent* it in any capacity, and are assessed on the tax list as so representing it, then they are taxpayers, and may become petitioners. George S. Batcheller, therefore, is entitled to be counted.

Another of the residue of the relators' list of names objected to is First Congregational Society. In regard to corporations, the act provides as follows: "And any solvent moneyed, manufacturing, or other corporation or company, formed under the laws of this State, and being assessed on real or personal property therein, shall have all the rights and privileges under this act, so far as property represented is concerned, as other taxpayers, and the board of directors or trustees of any such corporation or company, may apply to the county judge, by petition, in the same manner as herein provided for other taxpayers." (§ 1 of the act.) Now this Congregational Society is assessed on the last assessment roll, and it was proved before the county judge that its board of trustees, by resolution, authorized the signing of the petition in its name. I have no doubt that

The People v. Hulbert.

it was entitled to be counted by the county judge, as a proper petitioner.

And then comes the relators' list of names to which objection is taken—that of John C. Hulbert, county judge. His name appears on the last assessment roll, both in his individual capacity and as guardian, and it is signed to the petition in both capacities. The relators insist, not only that the sum which his name, as guardian, represents, cannot be regarded, but that by becoming a petitioner, he has deprived himself of all jurisdiction in the matter, and that the proceedings before him are, for that reason, altogether void. What has been already said in regard to Batcheller, applies to Hulbert, considered merely as guardian.

The more important question is, by becoming a petitioner, did he become incompetent to take cognizance of the proceeding? The relators' counsel bases his allegation of want of jurisdiction in the county judge upon the ground that by signing the petition he became an interested party to the proceedings, and was therefore deciding his own case. It is necessary to inquire, therefore, whether by signing the petition he did become any more interested in the question to be decided by him than he would have been if he had not signed it. The question was one affecting the pecuniary interests of every taxpayer in the town, whether petitioners or not, to wit: whether or not the town should be authorized to issue its bonds for \$100,000 in aid of the railroad. If he had not signed the petition, it is undeniable that he would have been competent, and yet he would have been, in that case, interested no less than he is now. The signing of the petition is, in effect, no more than a mode of giving the consent of the taxpayer to the issuing of the bonds. The bonds cannot be issued except by the vote of a majority of the taxpayers. The signing of the petition is a mode of taking the vote. The county judge then stands in the posi-

The People v. Hulbert.

tion of a taxpayer having voted for the issuing of the bonds. This, I think, does not disqualify him from counting the votes, and ascertaining whether a majority, in number and amount of taxable property represented, has been given for the bonding of the town, or not. If such a majority has been given, the county judge has no power in the premises, except to obey the statute, which makes it his duty, in such case, to appoint three commissioners to issue the bonds. There is no force in the objection that the county judge was deprived of jurisdiction. (*See People v. Wheeler*, 21 N. Y. 86. *Clark's Ch.* 190, *Moak's ed. and note.*) The aggregate amount of taxable property which these names represent is \$28,791, more than enough to overcome the deficiency claimed, and leave a considerable majority in amount represented by the petitioners.

The county judge having been satisfied in this case, by the proofs before him, that the petitioners were a majority of the taxpayers appearing on the last assessment roll, and represented a majority in amount, of the taxable property assessed on said roll, did so adjudge; and thereupon appointed three persons, to wit, Henry W. Merrill, Aaron B. Olmstead and Edward R. Stevens, (declared in said order to be respectively freeholders, taxpayers and residents of said town of Saratoga Springs,) commissioners to create and issue the bonds of said town to the amount of \$100,000, the sum set forth in the petition. The relators' counsel objects that it does not appear that these commissioners were freeholders; and further, that one of the commissioners appointed is a stockholder and director of said railroad, and that the other two are stockholders thereof, and that therefore they are not eligible to such appointment. I do not think, upon this proceeding, it is competent for the relators to bring in question the eligibility of the persons whom the county judge selected as commissioners. No such question is made by the affidavit or complaint on which the writ of *certiorari* was issued.

The People v. Hulbert.

Such complaint, after stating fourteen grounds on which it alleges that the proceedings before the county judge to bond the town were void, in none of which is any objection made to the commissioners, closes with a general statement, that the relators, believing the proceedings and decision of the county judge, and the *proposed proceedings* of the said commissioners, illegal and without authority, and tending to impose an illegal tax upon taxpayers of the town, ask that a *certiorari* may issue, to the end that said proceedings may be reversed, &c. And the writ does not call for any return on which the question of the eligibility of the commissioners can be examined. The return therefore fails to show anything on the subject of the eligibility of the commissioners, except that the order or judgment of the county judge states that they are freeholders, taxpayers and residents of said town. The only ground on which the relators can claim that they are stockholders or directors of the said railroad company, is that it appears incidentally, in the proofs before the county judge, that persons of the same name are such. If the question was open, this would not, under the circumstances, I think, be sufficient to warrant us now to decide that these commissioners were so connected with the railroad company; and as to their being freeholders, taxpayers and residents of the town, the statement to that effect is here, in the absence of proof to the contrary, sufficient. The learned counsel of the relators suggests that the act of the legislature, under which the proceeding was had, is unconstitutional and void. In this we cannot agree with the counsel, in the face of decisions of the Court of Appeals in the cases of the *Bank of Rome v. The Village of Rome*, (18 N. Y. 38;) *Starin v. The Town of Genoa*, (23 *id.* 439;) and *Gould v. The Town of Sterling*, (*Id.* 456.)

It is also claimed that the bonding of the town should have been based upon the assessment roll of 1870, instead of that of 1869, which was the one used in the proceed-

The People v. Hulbert.

ing. The evidence clearly showed that at the time the proofs were taken the assessment roll of 1870 had not been completed. I think the requirements of the statute have been complied with, and that the proceedings before the county judge were regular, and his order or judgment thereupon was fully warranted, and should be affirmed. No costs can be given to either party.

MILLER, P. J., concurred.

POTTER, J., (dissenting.) The act under which these proceedings are instituted, authorized the divesting of individuals of their estates by unusual methods, not known to the common law, and not known to general provisions of the statutes. It is a proceeding by special statute authority, and in derogation of the principles of the common law. In all such cases, jurisdiction can only be obtained by the strictest observance of the statute authority; nothing can be made out by intendment. The due execution and observance of the power granted must be shown; and in such cases there is no presumption that public officers have done their duty, but every step in the proceeding must be proved to be within the powers conferred by the act. (*Sharp v. Speir*, 4 Hill, 76. *Striker v. Kelly*, 2 Denio, 323. *Doughty v. Hope*, 3 id. 594. S. C., 1 N. Y. 79. *Adams v. Saratoga and Wash. R. R. Co.*, 10 N. Y. 330. *Cruger v. Dougherty*, Ct. of Appeals, December term, 1870.) I copy the following extract from an unpublished work, soon to appear: "But it must be kept in mind, however, that whenever, in pursuance of law, the property of an individual is to be divested, by these proceedings, against his will, there must be a strict compliance with all the provisions of the law, which are made for his protection and benefit. Those provisions must be regarded as in the nature of a condition precedent, which must not only be complied with before the right of the property

The People v. Hulbert.

owner is disturbed, but the party claiming authority, under the adverse proceeding, must affirmatively show such compliance." So, too, it is equally a well settled rule of law, that where a statute requires proof to be made in any proceeding, it must be by *legal evidence*; unless from the language of the statute it is intended to be by affidavit; or where, from some qualifying language in the context, it is apparent that the legislature intended some other method of proof than the best legal evidence. (*Buffalo and State Line R. R. Co. v. Reynolds*, 6 *How. Pr.* 98. *Brown v. Hickman*, 9 *John.* 75, 76. *Terry v. Fargo*, 10 *id.* 114. *Id.* 167.) Things to be proved must be established by competent and satisfactory *legal evidence*. (1 *Greenl. Ev.*, § 1.) It has lately been decided in the Court of Appeals, "*In the matter of the application of the Rens. & Sar. R. R. Co. v. Davis*," (reported in the *Albany Law Journal*, No. 57,) "that the taking of private property for public use is in derogation of private rights, and in hostility to the ordinary control of the citizen over his estate, and is not to be extended by implication. To authorize the taking of land under the right of eminent domain, the express authority must be shown." Guided by these rules in the construction of the act of 1869, (*ch.* 907,) under which these proceedings were taken, the second section of the act makes it the duty of the judge, at the time and place named in the notice, to proceed to *take proof* as to the said allegations in said petition, &c. This means *legal proof*. What were those allegations? Among other things, they are, that the petitioners are a majority of the taxpayers, or that they represent a majority of the said taxpayers, and that they desire bonds to be issued; and bonding the town and creating a liability against the town and against the taxable property to the amount of \$100,000. These were the things to be proved, and proved by legal evidence. Such legal proof, I think, was not produced before the county judge, as showed that a majority of the taxpayers

The People v. Hulbert.

and representatives of a majority of them had petitioned for the issuing of these bonds. A considerable portion of the taxable property of that municipality, to be divested, diminished, or made liable to the proposed tax or liability, belonged to infants, who were represented by guardians.

The property of infants is always, and in an especial manner, under the protection of the court, and every act calculated to affect their interests injuriously, the courts are ever jealous to regard; and whenever the court can discover any dereliction of duty on the part of guardians or trustees of infants, they will be careful to require, at least, that all the forms of law shall be observed, and they will not allow guardians or trustees to be guilty of devastation of the estates of their wards or *cestuis que trust*, or to put them at hazard. Upon the tax roll was an assessment of \$2000 against "the Shepherd children." This was claimed as a part of the majority of the taxable property petitioning for the bonds. The authority for this petition is the signature of one "John C. Shepherd, for Shepherd children." No authority was proved. But it is now said that the county judge did not count this in as a part; and it is alleged that the relators must affirmatively show that he did, in order to predicate error upon it. It is charged, upon oath, that the judge did so count this assessment as a part of the petition of the majority. The *certiorari* calls upon him to make return of all acts and decisions made by him, and his return entirely omits to state whether or not he did allow the said assessment, and the petition thereon, to be counted with such majority. The burden of showing want of jurisdiction is not with the relators, but by the party claiming jurisdiction, to show it when called upon. It is not therefore with good grace that, upon such a return, the respondents should seek to cast this burden upon the relators. But, besides this, there is the evidence of Mr. Batcheller, in which he enu-

The People *v.* Hulbert.

merates the names that were omitted, and this is not among the omissions. Another case is that of the Congregational church, whose name is upon the assessment roll "Congregational Society," but who petitioned for the issue of these bonds by the name of the "First Congregational Society," \$9400, which was signed by Doctor L. E. Whiting, Solon B. Bushnell and Levi S. Packard, under their corporate seal, and authorized by a resolution of the board of trustees. First. There was no legal or other proof before the county judge of the existence of such a corporation as is represented by the assessment roll, tax list or signatures; and if there had been such evidence, there was no power in this board of trustees to create such a liability against the property of the corporation they represent. A religious corporation, created under the general statute, consists not of trustees alone, but of the whole members of the society. It is the society that is incorporated, not the trustees; and its members are the incorporators. The trustees are only the managing agents or officers of the corporation, in charge of the temporal affairs of the society, with powers specifically conferred by the statute; but with no other powers. They cannot alien, mortgage or incumber the estate of the corporation but by permission of the court, except to mortgage for debt, under certain circumstances. (*Robertson v. Bullions*, 11 N. Y. 243.) Their powers being specified by the statute, this specification excludes all other powers; and to devastate and create liabilities is not among the specified powers. They neither proved to the judge their corporate existence, nor any power to sign such a petition. The act of 1869 confers no new power upon them. While it allows representatives of taxable property to petition, it is to be construed to mean legal representatives, especially in an act which would divest individuals or corporations of their estates. The county judge was bound to exclude this petition upon the evidence produced before him. This was

The People v. Hulbert.

to the amount of \$9400. Before the act of 1869, so would have stood the case at common law and statute. But it is claimed that there is an express provision in the act of 1869, that allows corporations to become petitioners. This is true. It permits, however, only *solvent* corporations so to petition; and the burden of proving solvency was with the petitioners. This was necessary to confer jurisdiction upon the judge. This was not done. In this case the judge has presented to us the proof, but its *solvency* was *not* proved.

Another petitioner was that of the Baptist church, representing \$740, set forth on the petition, "S. B. Terwilliger, W. Waterbury, Baptist church." This authentication is still more defective than that of the Congregational church. The only evidence in this case is, that the two persons named signed the petition. It does not appear that they were even members or trustees of this church; much less, that they were authorized to sign a petition to incumber their property. The same remarks apply to this case as to that of the Congregational church.

Another petitioner, whose name upon the assessment roll stands as follows: "Weibelzahl, Wm., Mrs. \$460." Upon the petition is the same name, with the addition at the end, "administratrix." There is no other name on the tax list that resembles this, and the name, "as administratrix," added, is allowed to be a petitioner, with no proof that she is such administratrix; nor is it easy to see how an administratrix can vote to incumber *real estate*, which generally belongs to the heirs at law. To entitle her to petition, she must be a legal representative of the real estate assessed.

Another petitioner, whose name was on the assessment roll was "The Red Spring Company," \$560. The return does not show by whom this petition was signed; and there is the absence of all evidence that any body was authorized to sign for this company, as well as the want

The People v. Hulbert.

of evidence of *solvency*, in order to confer jurisdiction upon the judge.

There were several petitioners claiming to represent estates, viz., Simeon H. Barrett's estate, \$600; C. Buell's estate, \$600; Nelson Burnham estate, \$360; Wm. Putnam estate, \$1,000. There is no legal evidence in the case that the persons signing the petition legally represented these estates, or had authority to sign the petition. The name of Elvira Putnam appears upon the tax list for \$200. The petition is signed by her as administratrix, without evidence of authority, or rather with the presumptive legal evidence that she possessed no authority. Among the petitioners is "Walter Barrett estate." What amount of estate this petition represented, cannot be determined, as no such name is found on the assessment roll for 1869; but adjoining, and next to two names of Barrett, is "Walter Balfour," and there is no other name upon the roll so nearly resembling it. This name represents \$1500. There is either no proof to make this petition good for any amount, or if it represents an estate, there is the additional defect of proof of authority; or if it is a clerical error, meaning "Balfour," then it is the representative of \$1500. If it be neither of these, the name is not on the tax list. The burden was upon the party claiming jurisdiction from it to show this, and to show how much he represented by his petition; it may have been received for a very large amount.

There also appeared upon the list of taxable estates the name of George S. Batcheller, guardian, \$6666. In this case Mr. Batcheller, being sworn, proved himself to be guardian of the Cook estate, but did not offer any evidence of his authority to incumber the estate of his ward or to commit devastation of it. He had no authority at common law, or by statute, unless the statute of 1869 can be stretched to authorize the estates of his ward to be thus divested, which, as we have already stated, is not the rule by which such statutes are to be construed. Had he ap-

The People *v.* Hulbert.

plied to the court for permission so to incumber it, it would have been refused. The same remark will apply to the petition of "John C. Hulbert, guardian," \$2000; to which it may be added, that in the latter case there was no evidence of the existence of guardianship, nor of the name of the estate or persons for whom he was guardian. The name of D. B. Harrington was also included, who was a petitioner to the amount of \$6000. This was also proved before the judge, and by the testimony of Mr. Batcheller. His petition was not excepted from the amount estimated as a part of the majority. The name of D. B. Harrington is not upon the assessment roll presented before us, nor any name that resembles it, representing any such sum.

The taxable value of the property of the town is, by the assessment roll, \$2,318,170; one half of this is \$1,159,085

The petitioners allowed by the county judge

seem to be	1,189,394
----------------------	-----------

Making a majority upon the petitions of . .	30,304
---	--------

The errors above pointed out, exclusive of the petition of Walter Barrett, the amount of

which does not appear, is	30,586
-------------------------------------	--------

Falling short of a majority	177
---------------------------------------	-----

But adding Walter Barrett, upon the assumption of a clerical error in his name

	1,500
--	-------

There is a failure of a majority by	1,677
---	-------

If I am right in these views, we need not discuss the other questions in the case. It is a question of jurisdiction. Jurisdiction was questioned; the writ called upon the actors to show their authority; the strictest construction of the statute was demanded.

I think jurisdiction has not been shown, and that the proceedings should be set aside.

Order and judgment of the county judge affirmed, without costs to either party.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Muller*, P. J., and *Potter and Parker*, Justices.]

LIVINGSTON vs. RENDALL, survivor, &c.

Although, under the Code, the time to answer expires by its own limitation, without the entry of a rule for default, yet the mere lapse of twenty days from the service of the summons is not the obtaining of a judgment.

Where a judgment was recovered against the defendant after his death, every step in the cause—except the service of the summons three years before—having been taken after the defendant was dead, the judgment was set aside on motion, by his administrator.

The former practice, under the Revised Statutes, of making a suggestion upon the record, of the death of the defendant before judgment was obtained, is practically inapplicable, under the Code.

There is no sense in which judgments are now entered as of any term; and there is no reason why a judgment by default, obtained in vacation, should relate back to the first day of the last preceding term.

MOTION by the defendant's administratrix to set aside a judgment.

M. Blauvelt, for the motion.

N. C. Moak, opposed.

LEARNED, J. This is a motion by an administratrix to set aside a judgment against her intestate, a sole defendant, on the ground that it was recovered after his death. The summons, without the complaint, was served September 5, 1866, by the plaintiff's attorney. The proof of such service was made January 29, 1870. And on the same day a judgment roll was filed, consisting of the summons and proof of service, of a complaint verified on the same day, by the plaintiff's attorney, of an affidavit made the same day, by the plaintiff's attorney, that no answer or demurrer had been served, and of the usual judgment for the recovery of \$2451.30, and costs, \$20.52. The complaint sets forth the recovery of a judgment against the defendant and another, June 5, 1856, and the assignment of such judgment to the plaintiff, and asks judgment for the amount thereof. A few months after the

Livingston v. Rendall.

recovery of the judgment in this action, the plaintiff's attorney wrote at the foot of the roll a suggestion of the death of the defendant on or about the 1st of January, 1870; as the fact was. The plaintiff and his attorney made oath that they had no knowledge of the defendant's death at the time of entering judgment. The plaintiff's attorney states that, after the service of the summons, he delayed entering judgment, owing to the defendant's statement that he was poor, and that he would pay when he could, if the plaintiff would not enter judgment; that in December, 1869, the plaintiff's attorney notified the defendant that he should enter up judgment.

The plaintiff claims that the judgment is properly entered, under the authority of 2 *R. S. marg. p. 359, § 7*. This section provides that in all cases in which a record of judgment shall be filed and docketed within one year after the death of the party against whom such judgment was obtained, a suggestion of such death, if it happened before judgment rendered, shall be entered on the record.

There are several provisions of the Revised Statutes, made in reference to the old practice,* which have become practically inapplicable to the practice under the Code. Originally, judgments were perfected only in term time; and even after the statute allowed the perfecting of judgments in vacation, still the "*placita*" was of the preceding term, or of the term when issue was joined. But in theory and in form, whenever a default was taken or judgment by default granted, it was done by the court. And this was evidenced by the entry of a rule in the common rule book. In an action on a judgment like the present, the plaintiff's attorney, on filing proof of service of process or its equivalent, would have entered first, the defendant's appearance, next his default, then a judgment that the plaintiff recover against the defendant his debt.

This would be the judgment of the court, in the case; in theory, granted by the court; in fact, taken by the

Livingston v. Rendall.

plaintiff at his peril. Subsequent to this obtaining of judgment, another thing was to be done by the plaintiff, before any proceedings could be had thereon, viz., the filing a record. (2 *R. S. marg.* p. 360, §§ 14, 15.) This was a more formal document than the collection of papers which, under the present practice, constitutes the judgment roll. It was a history of the proceedings. It did not contain the proof of service of process; for that had been previously filed. It was the record of a judgment which *had been* obtained; the judgment having been previously entered in the rule book of the court. It is to this practice that section 7, above cited, refers; that is, to the filing of a record within a year after the death of the party against whom the judgment was obtained. The judgment referred to, in that section, was either obtained during the life of the party, or was rendered on a verdict obtained during his life. The record of it might be filed after his death.

Now, the difficulty in this present case is, that there was no judgment taken against the defendant during his life, and no verdict rendered against him.

Probably the plaintiff might have filed his proof of service, and entered a rule for judgment; although this practice seems at present to prevail only in cases of actual application to the court for judgment. And if the plaintiff had taken and entered a judgment during the life of the defendant, it is very possible that he could have filed the judgment roll within a year after the defendant's death. But he did no such thing. The only judgment which he has obtained was obtained after the defendant's death. I think that he could not do this. It is true that the time to answer now expires by its own limitation, without the entry of a rule for default. But certainly, a judgment is not recovered against a defendant by the mere inaction of the plaintiff. The mere lapse of twenty days from the service of the summons is not the obtain-

Livingston v. Rendall.

ing of a judgment. Indeed, it appears by the plaintiff's papers that the obtaining of a judgment was delayed, not, perhaps, by agreement, but by mutual understanding, from September 5, 1866, to the middle of December, 1869; which was till about two weeks before the defendant's death. There was, under the old practice, and there still is, I think, a plain distinction between a judgment and a judgment roll. The distinction can be easily seen in such actions as foreclosure or partition, and others of that nature. But in simple actions on contract, where judgment is taken by default, the practice seems to prevail that there shall be no entry of judgment except what is contained in the roll. Yet the Code requires the clerk to enter judgments in a judgment book. (§ 279.) At any rate, in this present case, there was no verdict, and there was no judgment obtained until after the death of the defendant. And, indeed, it was not till after his death, and till the very day of filing the roll, that the complaint was verified, or proof of the service of the summons made. Every act, therefore, except the service of the summons, three years before, was done after the defendant was dead.

It will be seen, also, by reference to 2 *R. S. marg. p.* 387, §§ 3, 4, 5, that under the old practice, it was only after verdict or judgment interlocutory, that a final judgment could be entered when the sole defendant had died. Even in the case of judgment interlocutory, a *scire facias* was to be issued against the executors and the judgment was against them. (§ 3.)

Nichols v. Chapman, (9 *Wend.* 455,) is a case on bond and warrant of attorney, holding that a judgment on bond and warrant may be entered after the defendant's death; provided it be entered as of the term in which he died, if the death happen during a term; and if in a vacation, then as of the term preceding. But that decision was based on the old and technical theory that a judgment was entered

O'Brien v. Capwell.

as of the first day in the preceding term; and it is doubtful whether, even then, that decision would apply to a judgment by default. There is certainly no such theory now remaining. There is no sense in which judgments are entered as of any term. And it would be very useless, and worse than useless, to continue a mere fiction when no good is to be gained.

The judgment roll in question does not purport to be as of any term, general or special; and there is no reason why it should relate back to first day of December term.

Motion granted, with \$10 costs.

[ALBANY SPECIAL TERM, June 27, 1871. *Learned, Justice.*]

O'BRIEN vs. CAPWELL.

506 497
764-2300

In cases of negligence consisting of mere omission of duty, where no affirmative fault, misfeasance or affirmative wrong was committed by the defendant, or is imputed to him, it is essential, to sustain a recovery, to establish that the defendant owed some clear, specific legal duty to the party injured, which was violated.

As between landlord and tenant, the law is well settled, when there is no fraud or false representations, or deceit, and in the absence of an express warranty or covenant to repair, that there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use.

The principle of *caveat emptor* applies to all contracts for the letting of property, real, personal or mixed, as much as to contracts of sale, with one or two recognized exceptions.

Where there is no covenant on the part of a lessor to repair the buildings upon the demised premises, he is not liable to respond in damages to a servant of the tenant, for injuries sustained by reason of a want of repairs.

When a lessor is under no obligation to repair the premises, and their condition is equally as well known to the tenant as to him, there is no basis for an action against him, for negligence, by the tenant or any servant of his, or person standing in his place, arising from the fact that the premises were out of repair.

O'Brien v. Capwell.

APPEAL from an order of the city court of Brooklyn, denying a motion for a new trial, and from a judgment in favor of the plaintiff, entered on the verdict of a jury.

The action was for damages sustained by the plaintiff by a fall from a piazza, or verandah, extending across the rear of a dwelling house, owned by the defendant, and occupied at the time by a tenant by the name of Wade, under a written lease for one year. The plaintiff was a washerwoman, in the employ of the tenant. While suspending clothes upon the railing of the back piazza of the house, it gave way, and she fell and broke her arm. The action was tried in the Brooklyn city court, where the plaintiff recovered a verdict of \$350, which, upon notice for that purpose made, the court refused to set aside and grant a new trial; and from this order the defendant appealed, and also from the judgment entered up thereon.

A. B. Capwell, appellant, in person.

I. From the evidence, it is clear that the plaintiff was, at the time of the accident, the servant, and in the employment of Mrs. Wade, the wife of the tenant, and that she was upon the premises without the knowledge or consent of the defendant.

There was no privity of contract between the plaintiff and defendant, from which any duty could be inferred, or obligation imposed upon the defendant, by law. The most that can be claimed for the plaintiff is that, as the employee of the tenant, she may be permitted to assert such rights as the tenant might have against the landlord.

II. As between the tenant and the owner, no claim for damages could be sustained. The injury is alleged to have arisen from want of repairs to the premises leased. The plaintiff's witness, Mrs. Wade, swears that the condition of the premises was the same when she moved in, as at the time of the accident. 1. The tenant, knowing

O'Brien v. Capwell.

the condition of the premises, rented them as they were, without requiring the owner to covenant to repair or keep the premises in repair. No obligation, express or implied, rested upon the landlord to repair. (*Kastor v. Newhouse*, 4 E. D. Smith, 20.) 2. A landlord is in no case bound to repair, unless by force of an express covenant or contract. And though rented for a specific purpose, there is no implied contract or covenant, that the building is or shall continue to be fit for such purpose. (*Howard v. Doolittle*, 3 Duer, 464.) In this case the court says, in regard to repairs: "It is not a duty which the law considers as flowing from the relation of the parties, or which can be implied from the nature of their contract." (*Casey v. Mann*, 5 Abb. 91.) 3. There is no implied covenant or warranty on the part of the lessor of a dwelling house, that the premises are, or will continue to be, safe or tenantable. (*Cleves v. Willoughby*, 7 Hill, 83. *Post v. Vetter*, 2 E. D. Smith, 248. *Libby v. Talford*, 48 Maine, 316. *Estep v. Estep*, 22 Ind. 114.) 4. The rule *caveat emptor* applies to such a case. (*Clews v. Willoughby*, *supra*. *Westlake v. DeGraw*, 12 Wend. 669. *Howard v. Doolittle*, 3 Duer, 464. *McGlashan v. Tallmadge*, 37 Barb. 313, 315. *Johnson v. Dixon*, 1 Daly, 178. *Dutton v. Gerish*, 9 Cush. 86. *Foote v. Poyer*, Id. 242. *Wells v. Castle*, 3 Gray, 323. *Sutton v. Temple*, 12 Mees. & W. 52. *Hart v. Windsor*, Id. 68.)

III. In this case the plaintiff cannot rely upon any undefined, hazy or imaginary duty or obligation supposed to be imposed by law upon the defendant. It is undoubtedly true that there is a distinction between an action on contract and an action of tort, and the counsel for the defendant will hardly claim that an action for damages for negligence is based upon express contract. What the defendant does claim, is that as he was under no legal obligation to repair the premises, the law imposes no duty or obligation upon him to respond in damages for injuries received by a servant of his tenant in possession, by reason

O'Brien v. Capwell.

of a want of repairs, or of the insufficiency of the structure upon the premises leased. In *Mayor v. Cunliff*, (2 *Comst.* 175,) which was an action on the case, against the city of Albany, as builder of a bridge, brought by one who was injured by its fall, the evidence showed that the fall of the bridge was occasioned by the careless and unsafe manner of its construction, but that it was in the possession of another, at the time of the accident. Bronson, J., says: "No case has been produced, and I hazard little in saying that none can be found, where an action like the one before us has been maintained against a party who was not under a legal obligation to repair, or see that repairs were made." (*Robbins v. Jones*, 109 *Eng. Com. L.* 220.)

IV. The exceptions to the rulings of the judge on the trial were well taken. 1. The judge erred in refusing to dismiss the complaint. (*Casey v. Mann*, 5 *Abb.* 91.) 2. It was error to refuse to charge, as requested by the defendant, "that the tenant having rented the premises as they were, without any covenant on the part of the defendant to repair, cannot claim damages from the defendant, arising from the want of repairs." (*Kaston v. Newhouse*, 4 *E. D. Smith*, 20.) 3. It was error to refuse to charge, as requested by the defendant, "that the defendant having leased the premises for a dwelling house, without covenants to make repairs, and the same being in possession of the tenant at the time of the accident, the defendant is not liable to the plaintiff for any injuries received upon the premises in consequence of their being out of repair, or from the insufficiency of the structures thereon." (*See cases cited under second point.*) 4. The judge erred in charging the jury as requested by the plaintiff.

V. The authorities cited by the plaintiff's counsel on the trial are clearly distinguishable from this. They all refer to cases of nuisance, public or private, such as interruption of water from the roof, flowing lands, openings or obstructions in a public highway or navigable river. 1. In these

O'Brien v. Capwell.

cases owners are held responsible as insurers, for unlawfully using the highway or interfering with the rights of others. Such are the following cases: *Rosewell v. Prior*, (1 *Lord Raym.* 713; and *S. C.*, 2 *Salk.* 460;) *Cheetham v. Hampson*, (4 *T. R.* 318;) *Bellows v. Sackett*, (15 *Barb.* 96;) *Blunt v. Aikin*, (15 *Wend.* 522;) *Waggoner v. Jermaine*, (3 *Denio*, 312;) *Moody v. The Mayor*, (43 *Barb.* 282; *S. C.*, 34 *How. Pr.* 288.) 2. Another class of cases cited involves the strict rule applicable to carriers of passengers, and hirers of machinery, &c., in which absolute warranty is an element of the contract. (*Weed v. Panama R. R. Co.*, 17 *N. Y.* 362. *Bremner v. Williams*, 1 *Car. & P.* 414. *Alden v. N. Y. Cent. R. R. Co.*, 26 *N. Y.* 102. *Cook v. Dry Dock Co.*, 1 *Hilton*, 445.) 3. But no such principle is applicable to persons standing in the relation that the parties to this action occupy toward each other. No case can be found in which the owner of premises is held to be an insurer of the sufficiency of his structures thereon.

John H. Bergen, for the respondent.

I. The evidence clearly established the negligence of the defendant in erecting, maintaining and upholding the piazza in an unsafe and dangerous condition. This made him liable. 1. The piazza was in an unsafe and dangerous condition when he leased the house to Wade. 2. He promised the tenant, on the 2d or 3d of May, when complaint was made of the condition of the piazza, that "he would attend to it." (*Izon v. Gorton*, 5 *Bing. N. C.* 501.)

II. The principle, that "the owner of the premises is liable for injuries sustained by an individual, by reason of the defective construction, and dangerous condition of the premises, notwithstanding the premises are, at the time, in the possession of a tenant, who has covenanted to keep them in repair, if the defect existed when the owner leased the property to him, is well settled. (*Moody v. The Mayor*, 43 *Barb.* 282. *Rosewell v. Prior*, *Salkeld*, 460. *S. C.*

O'Brien v. Capwell.

fully reported, 1 *Ld. Raym.* 713. *Cheatham v. Hampson*, 4 *T. R.* 318. *Johnson v. Dixon*, 1 *Daly*, 178.)

III. This case is still stronger, because here the tenant did not covenant to repair, and the defendant, by the terms of the lease, reserved the right to enter to make repairs.

IV. It was proper to bring the action against the owner, and he is clearly liable. (*Bellows v. Sackett*, 15 *Barb.* 103, and cases cited. *Wagner v. Jermiane*, 3 *Denio*, 306, 312. *Cooke v. President &c.*, 1 *Hilt.* 436. *The Mayor &c. v. Cunliff*, 2 *Comst.* 165, 180. *The Mayor &c. v. Bailey*, 2 *Denio*, 433. *Eakin v. Brown*, 1 *E. D. Smith*, 43, 44, 46.)

V. This case, on the evidence, is a much stronger one against the defendant than any of the authorities cited above: 1. Because, here, there was no covenant on the part of the tenant to repair. 2. The landlord reserved the right, by the terms of the lease, to enter and make repairs. 3. By the terms of the lease, the tenant covenanted not to make any alterations to the premises. 4. Express personal notice, to the defendant, of the dangerous condition of the premises, was proved at the time the lease was made, and he promised to attend to it. 5. He was bound by his promise so made to make repairs.

VI. So far as the plaintiff is concerned, who is a stranger, the defendant is liable for the injury she sustained, irrespective of his duty to make repairs, as between himself and his tenant. 1. He has erected and maintained, and upheld a nuisance on his premises, and that nuisance caused the injury to the plaintiff. 2. He was notified of the nuisance; promised to abate it, but did not. 3. The doctrine of *caveat emptor* has no application to the facts of this case.

VII. The landlord is not compellable to make repairs, without an express covenant so to do. But if he does not keep his premises in a safe condition, he is liable to third persons for any injury they sustain, arising from such defect. The piazza in question was rotten and decayed when

O'Brien v. Capwell.

the premises were let, and the defendant had notice of its condition at that time. He erected the nuisance by renting it in that dangerous condition, and he maintained and upheld it by not repairing it after he had received the notice, and by collecting rent after such notice. Again; the defendant is clearly liable, under the reasoning of the cases of *Storrs v. Utica*, (17 N. Y. 104;) *Creed v. Hartmann*, (29 *id.* 591;) *Congreve v. Morgan*, (18 *id.* 85;) *Congreve v. Smith*, (*Id.* 79;) *Lowell v. Boston and L. R. R.*, (23 *Pick.* 24;) *Earll v. Hale*, (2 *Metc.* 353;) *Stone v. Codman*, (15 *Pick.* 297;) *Robbins v. Chicago*, (4 *Wall.* 678.) He let the premises in a dangerous condition, had notice of the condition, promised to attend to it, and repair it, but did not; he is liable on his promise.

A landlord is just as liable for a trap created on his own premises, when he is notified of it, and agrees to abate it, as he is for one he creates in the sidewalk in front of his premises, at least to a third party who is lawfully on his premises.

By the Court, E. DARWIN SMITH, J. This action is one for negligence. It was brought, as the cause of action is stated in the complaint, upon the ground that the defendant, being the owner of the premises when the plaintiff sustained her injury, "had negligently, carelessly and wrongfully allowed the piazza, platform, railing and stairs, upon said demised premises, to become decayed and out of repair; and that by reason of such decay and want of repair, the same were unsafe at the time of the accident, and had been so unsafe for a long time previous thereto, and unfit for use, as the defendant well knew, and were carelessly, negligently and wrongfully allowed to so remain, by said defendant." The charge of the judge, at the trial, substantially affirmed this view, in respect to the defendant's negligence, and the verdict under the charge was doubtless based upon this ground. The negligence

O'Brien v. Capwell.

thus imputed and found, is the negligence of mere omission of duty. In such case, where no affirmative fault, misfeasance or affirmative wrong was committed by the defendant or is imputed to him, it is essential to sustain a recovery, to establish that the defendant owed some clear, specific, legal duty to the party injured, which was violated. (*Nicholson v. The Erie R. Co.*, 41 N. Y. 529.) Upon this point, I think it is clear that the defendant owed no legal duty to the plaintiff. There were not, as between them personally, any relations involving reciprocal duties, more than existed as between mere strangers. But assuming, as I think we should upon this point, that she was a servant of the tenant, and stood in his place, the question is then narrowed to the simple inquiry whether there existed any duty on the part of the defendant to his tenant, which would have entitled him to maintain this action if he had suffered the injury, instead of his servant. As between landlord and tenant, I think the law is well settled when there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, that there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use; and that the principle of *caveat emptor* applies to all contracts for the letting of property, real, personal or mixed, as much as to contracts of sale, with one or two recognized exceptions, which do not apply in this case. (*McGlashan v. Talmadge*, 37 Barb. 314. *Cleves v. Willoughby*, 7 Hill, 83. *Howard v. Doolittle*, 3 Duer, 464. *Dutton v. Gerish*, 9 Cush. 89. *Gott v. Gourdy*, 22 Eng. L. and Eq. 173.)

In this case there was no covenant on the part of the landlord to repair. The premises were leased in April, for one year, and had been occupied safely from May 1st, by the tenant, until the time of this accident, which occurred on the 31st of October following. The tenant must

Wright v. Wright.

have known the situation of the premises long before the accident, and his wife testified that she saw that the lattice work and stairway which gave way was decayed, when she first moved into the house; that the premises were in the same condition when they moved in as when the accident happened; and that she spoke to the defendant early in May on the subject. The defendant being under no obligations to repair the premises, and their condition being equally as well known to the tenant as to him, there is no basis for an action of negligence, by the tenant, or any servant of his, or person standing in his place, arising out of the fact that they were out of repair.

The motion for a nonsuit should have been granted, at the trial, and the judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

[SECOND DEPARTMENT, GENERAL TERM, at Poughkeepsie, June 14, 1870.
J. F. Barnard, P. J., and E. D. Smith and Daniels, Justices.]

DELIA WRIGHT vs. WILLIAM H. WRIGHT.

A promissory note given by a man to a woman, in consideration of her promise to marry him, is made upon and for a sufficient and valuable consideration.
GEO. G. BARNARD, J., dissented.

The subsequent marriage of the parties will not affect or destroy such a note.

It is a contract to pay, made in contemplation of marriage, and by force of the statute, (*Laws of 1849, ch. 879*), remains in full force after the marriage. It *seems* the payee can sue upon such a note, at law. But whether she can or not, this court having the case before it, in an action on the law side, showing that the note was the wife's separate property, ought, in some shape, to apply a remedy.

The case of *Curtis v. Brooks*, (37 *Barb.* 476,) commented on, and declared to be inconsistent with the decision in *Dyggert v. Remerschnider*, (32 *N. Y.* 631.)

Strong v. Skinner, (4 *Barb.* 552,) and *Tisdale v. Jones*, (38 *id.* 523,) distinguished from the present in that the marriages, there, took place before the act of 1849 was passed.

Wright v. Wright.

APPEAL by the defendant from a judgment entered upon the report of a referee, in an action upon a promissory note. The facts are stated in the opinions.

CARDOZO, J. I think the judgment in this case should be affirmed. The note was given in consideration of a promise to marry. So we must, in support of the judgment, intend that the referee found, there being evidence which would support that conclusion. After having, on direct examination, testified generally that the consideration of the note was a marriage contract between her and the defendant, the plaintiff, on cross-examination, further said that in the month of February, the defendant told her if she would be his wife he would give her his note for \$5000, and she "agreed to have him at that time"—agreed that she "would marry him." I think, therefore, that the note was given in consideration of her promise to marry the defendant, and that therefore the note was made upon and for a sufficient and valuable consideration.

Undoubtedly this contract (the note) would, at common law, have been extinguished by the marriage; but that rule was changed by the statute of 1849, (*ch.* 375,) by which (§ 3) it was enacted that "all contracts made between persons, in contemplation of marriage, shall remain in full force after such marriage takes place." The subsequent marriage of these parties did not, therefore, affect or destroy the note. It was a contract to pay, made in contemplation of marriage, and by force of the statute remains in full force after the marriage.

Curtis v. Brooks, (37 Barb. 476,) contains no reasoning to show that the note was extinguished, but simply refers to a manuscript decision as having been made to that effect. I might, nevertheless, yield to its authority as a general term case, except that it seems to me inconsistent with *Dygert v. Remerschnider*, (32 N. Y. 631.)

In *Strong v. Skinner*, (4 Barb. 552,) and *Tisdale v. Jones*,

Wright v. Wright.

(38 *id.* 523,) cited by Judge BARNARD, the marriages took place before the act of 1849, and, of course, do not bear upon the present case, which is assisted by that statute. Whether the plaintiff can sue at law does not seem to me to be a very material question, though I think she can, because there is no doubt that she may sue in equity, and as the same court is to administer justice, whether through the form of law or the proceeding in equity, it seems to me that when we have the case before us, showing that this note was her separate property, we ought in some shape to apply a remedy.

I think the judgment should be affirmed.

INGRAHAM, P. J., concurred.

GEO. G. BARNARD, J., (dissenting.) The plaintiff and defendant are husband and wife. Prior to their marriage, the note in suit was executed by the defendant.

The plaintiff, when asked what was the consideration of the note, testified on the trial, that the defendant proposed marriage to her, and afterwards she said to him that she would not marry him unless he settled something on her. She wanted a mortgage upon his property. This he declined to give, and subsequently he stated to her if she would be his wife he would give her his note for \$5000. A few days thereafter, the defendant called upon the plaintiff, at her store, and then drew up and signed the note in suit, and delivered it to her. The note, although executed on the 4th or 5th, was dated the 1st of March. A few days after the delivery of the note, the parties were married. They lived together a short time, and then separated.

This is a common law action to recover the amount of the note, with interest from its date. The referee ordered judgment for the plaintiff, and the defendant appealed.

I am of the opinion that this action cannot be main-

Wright v. Wright.

tained by the wife, the payee of the note, against her husband.

This note had no vitality on its delivery. It was given for no consideration other than as testified to by the plaintiff. In the language used in the case, when the note was spoken of between the parties, it was given "to buy a wife," and was not to be binding or valid till after marriage. It was merely a written promise given by the defendant, to pay her \$5000 and interest thereon, if she would marry him; and on this written promise the action is brought. This agreement, by the subsequent marriage of the parties, became extinguished, at law. (*Strong v. Skinner*, 4 Barb. 552. *Tisdale v. Jones*, 38 *id.* 523.) What, if any, rights the plaintiff may have, in equity, on the contract to which she testifies, it is not necessary, now, to determine. The acts of 1848, 1849, 1860 and 1862, give the plaintiff no right to maintain this action. (44 Barb. 366. 42 *id.* 374, 641. 25 N. Y. 328.)

The judgment should be reversed, and a new trial granted; and in the judgment entered it should appear that the reversal is upon the law and the evidence.

The order of reference should be vacated.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 8, 1871. *Ingraham*, P. J., and *Cardoso* and *Geo. G. Barnard*, Justices.]

LUDLOW *vs.* THE AMERICAN EXCHANGE NATIONAL BANK.

Where a certificate of stock was assigned by the plaintiff to the defendant, to be held and applied not only in liquidation of an indebtedness of the plaintiff, but of all future advances which the defendant might make; and further advances were made, by the defendant, by the payment of calls on the certificate; *Held*, in an action to redeem the certificate, that as an account would have to be taken of such advances, and also of the payments made by the plaintiff, and such account was necessary to be taken before judgment, this made the case *referable*.

If a case is referable, the discretion of the judge ordering a reference will not be reviewed on appeal.

A PPEAL, by the defendant, from an order made at a special term, directing a reference.

The complaint alleged that on the 23d day of January, 1856, one Samuel L. M. Barlow, on behalf of W. H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Samuel W. Comstock, David Leavitt, Charles Gould, David Hoadley, this plaintiff and associates, made to the Ohio and Mississippi Railroad Company certain propositions for the completion and construction of said road. That on the said 23d day of January, the said propositions were accepted by the said Ohio and Mississippi Railroad Company, and on the 10th day of May, 1856, an agreement embodying these propositions and their acceptance was made between said Aspinwall, Alsop, Chauncey, Comstock, Leavitt, Gould, Hoadley, this plaintiff and his associates and the said Ohio and Mississippi Railroad Company. That on the said 10th day of May, this plaintiff and his associates entered into an agreement between themselves, whereby the said parties agreed with each other to fulfill and perform everything contained in the said proposition to be performed and fulfilled, and to contribute towards such performance in the proportion which the per centage set opposite their respective signatures bore to the whole. That the number of shares or interests of said associates, under said agreement, in the aggregate, was forty, of

Ludlow v. American Exchange National Bank.

which the plaintiff was the owner of one part or share, known by the number 38, and which said part or share was represented by scrip, in the usual form of a stock certificate, transferable at the office of the trustees of said associates. That it was further agreed between the said parties that on the completion of the Ohio and Mississippi railroad and performance of contracts, a final account should be rendered, and a division of the properties, securities and moneys on hand should then be made among the said parties or their representatives, in the same proportion in which the said parties were to contribute as aforesaid. That said contract had been fulfilled and said road completed, and that under and by virtue of said agreement above set forth, there became divisible to and among the said associates or their representatives, a large amount of property, securities and money, to one-fortieth of which the above named share, numbered 38, belonging to said plaintiff, was and is entitled.

Second. That in the month of August, 1857, the said share represented by a scrip certificate known as No. 38, being the property of the plaintiff, and calls having been paid by him thereon, amounting to \$31,250, was, with other securities belonging to said plaintiff and others, in the possession of a corporation then carrying on business in the city of New York, known as the Ohio Life Insurance and Trust Company, and the said scrip was held by said company as the bailees and custodians of the same.

Third. That on the 22d day of August, 1857, this plaintiff was indebted to the said The Ohio Life Insurance and Trust Company, and that corporation was very largely indebted to a corporation organized under the general banking law of this State, and carrying on the business of banking in the city of New York, under the name of the American Exchange Bank. At the solicitation of the officers of said bank, and under the understanding and agreement that the several and respective securities and

Ludlow v. American Exchange National Bank.

property hereinafter mentioned, or the proceeds and dividends thereon, should be collected by said bank and applied to the liquidation of said indebtedness, and the surplus of such securities and property accounted for after a final liquidation by said corporation or its successors; that all advances which might be required to be made, should be made, and be with interest reimbursable therefrom, a large amount of securities and property, including, with the assent of this plaintiff, the share in said Ohio and Mississippi association above mentioned, were turned over to the said bank, and said certificate No. 38 was duly indorsed and transferred by said plaintiff to the said American Exchange Bank. That said share was received with full notice of the plaintiff's rights and claims thereto, and that the said Ohio Life Insurance and Trust Company had no property therein.

Fourth. That the said, The American Exchange Bank, acting under the trust agreement above set forth, had made various payments and advances in the shape of calls on said share No. 38, of said associates, that is to say, on the 11th of December, 1857, the sum of \$12,853.75, and \$17,892 on the 9th of January, 1858, and in or about September, 1859, \$3765, of none of which had repayment ever been demanded of this plaintiff. That on or about the 2d day of June, 1863, a final accounting and settlement was had and made of all indebtedness of the said Ohio Life Insurance and Trust Company with the said American Exchange Bank, except the amounts paid as installments on said share, which were not taken into account, the said company making no claim to said share, and the said share was left by the receiver of the Ohio Life Insurance and Trust Company in the possession of said bank, free of any claim thereto on the part of said receiver.

Fifth. That this plaintiff had, previous to the said 2d of June, 1863, satisfied and discharged any and all indebt-

Ludlow v. American Exchange National Bank.

edness for which the said Ohio Life Insurance and Trust Company could claim to hold said share.

Sixth. That, as the plaintiff was informed and believed, the said The American Exchange Bank, under and by virtue of their possession of said share, held and acquired by them under the agreement and arrangement above set forth, had received as dividends thereon, or as the proceeds thereof, the following securities, that is to say, \$172,576 in the common stock, and \$22,143 in the preferred stock of the Ohio and Mississippi Railroad, and a large amount of cash; that subsequently to the receipt of such securities and cash, the said American Exchange Bank, with the consent of its stockholders, was duly re-organized under the national banking law, and thenceforth became and was known and styled as The American Exchange National Bank, and said securities and cash, or the proceeds thereof, had been received by the defendants, as the successors and representatives of said American Exchange Bank, and had been disposed of by them in whole or in part.

Seventh. That the plaintiff was advised and claimed that he was entitled, as the owner of said share, to redeem the share, and, on payment of any amount that may be due thereon for advances made by said defendants, or their predecessors, The American Exchange Bank, to an account thereof, and had offered to redeem the same, and had requested such an account, but said defendants wholly refused to account to him therefor, or for the proceeds thereof, or to acknowledge his rights in the premises. Wherefore, the plaintiff demanded that an account might be taken of any and all sums that might be justly due and owing on account of calls paid on said share, of all sums received by said defendants from the sale or disposition of the securities received by them on account of such share, and of the amount of such securities now remaining on hand, and that the defendants might be ordered and adjudged to pay

Ludlow v. American Exchange National Bank.

over and account to the plaintiff for the balance which, on such accounting, might be found due to him, and to transfer and deliver over to said plaintiff, all of such securities remaining on hand, being the proceeds or representative of said share in their hands after satisfying any balance due them thereon; and for other and further relief.

The defendant, by its answer, admitted, among other things, that the number of shares or interests of said associates, under said agreement, was forty; that the plaintiff subscribed for one of said shares or interests; that scrip, in the usual form of a stock certificate, representing such share or interest, and designating the same by the number 38, was issued to the plaintiff by the said associates; that calls upon said share or certificate to the amount of \$31,250 were paid by the said plaintiff, from and with the moneys of the Ohio Life Insurance and Trust Company; that the contract for the completion of the said railroad was duly executed and performed; that upon the fulfillment thereof, there became divisible among the said associates, or their legal representatives, a large amount of money, property and securities; that the interest in the said contract represented by said certificate No. 38, was entitled to one fortieth part of said property, securities and money. That on the 22d of August, 1857, the plaintiff was indebted to the said Ohio Life Insurance and Trust Company, and the said Ohio Life Insurance and Trust Company was in like manner indebted to the American Exchange Bank, as in the complaint alleged. That on the said 22d day of August, 1857, the said certificate No. 38 was transferred and delivered to the said American Exchange Bank by the plaintiff, and the said Ohio Life Insurance and Trust Company, in the manner, for the purposes, and upon the consideration thereafter particularly set forth; that subsequently to the said transfer, the said American Exchange Bank, as the assignee and owner of

Ludlow v. American Exchange National Bank.

the said share and interest in said contract, and of the said scrip and certificate No. 38, made further advances towards the completion of the said contract, and the construction of the said railroad, to the amounts for that purpose mentioned in the complaint. That on or about the 2d day of June, 1863, a final accounting and settlement was had and made of the indebtedness of the Ohio Life Insurance and Trust Company to the defendant, by and between the latter and the receiver of the said Ohio Life Insurance and Trust Company, and that upon such settlement the said share and certificate No. 38 was left by the receiver in the possession of the said bank, free from any claim thereto on the part of the receiver; that the defendant, prior to its re-organization, had received as dividends on the said share, or as the proceeds thereof, certain amounts, both of the common stock and of the preferred stock of the said Ohio and Mississippi Railroad Company, but not the amounts in that behalf in the complaint alleged, together with a certain amount of cash; and that subsequently to the receipt of such stock and cash, the said American Exchange Bank was duly re-organized, pursuant to the national banking law, under the name and style of the American Exchange National Bank, and that by virtue of such re-organization the defendant became the legal successor and representative of the said American Exchange Bank, and in that capacity and relation the holder and owner of all the property, assets and effects of the said American Exchange Bank, including the said share and certificate and the said stock and property received as dividends thereon, and proceeds thereof as aforesaid; and that the defendant had since sold and disposed of the said stock of the Ohio and Mississippi Railroad Company so received as the proceeds of said share and certificate as aforesaid.

The defendant, by a general denial, put in issue all the allegations of the complaint not admitted, and set up

Ludlow v. American Exchange National Bank.

several matters of defense, among which was the statute of limitations.

Chapman, Scott & Crowell, for the appellant.

I. From the pleadings, the following appear to be the issues in this case, viz.: 1. Was the assignment of the share and interest in the contract with the Ohio and Mississippi Railroad Company, represented by the scrip certificate No. 38, made by the plaintiff to the defendant, as alleged in the complaint, so made for the purpose and with the reservation of interest and ulterior title in the plaintiff, there set forth? And did the defendant receive it under an obligation to account to the plaintiff for the disposition or avails of the interest so assigned; or, was it transferred for the purpose, and in the absolute and unqualified manner, as far as the plaintiff was concerned, stated in the answer? 2. Independent of the legal transfer and assignment, had the Ohio Life Insurance and Trust Company, at the date of the assignment, the equitable title and interest in the certificate set forth in the answer, or was it true, as alleged in the complaint, "that the said Ohio Life Insurance and Trust Company had no property therein?" 3. If the plaintiff retained any such interest in the certificate as would have entitled him to the accounting demanded in this action, in case (as the complaint alleges) the final accounting between the defendant and the receiver of the trust had been made, without the making of any claim to said share by said receiver, or the taking into account the amounts paid as installments on said share; then were the said amounts taken to account, and the value of said share fully settled and accounted for by the defendant, as alleged in the answer? Or, was the said share "left by the receiver of the said Ohio Life Insurance and Trust Company in the possession of said bank, (the defendant,) free of any claim

Ludlow v. American Exchange National Bank.

thereto on the part of said receiver," as alleged in the complaint?

II. From the pleadings, therefore, it is evident that no case can be made out by the plaintiff for the accounting claimed, or for any other relief whatever, until he shall have succeeded, not only upon one, but upon all the foregoing issues. If the defendant succeeds upon any one of these issues there is an end of the case.

III. It is equally clear that the determination of no one of these issues necessarily involves the examination of any long, or any account whatever. 1. There can be no pretense that the determination of either of the first two issues above stated, viz., as to the mode and purpose of the assignment, or as to the existence of the equitable interest of the Ohio Life Insurance and Trust Company, requires the examination of any account whatever. 2. Nor can it be pretended that under the third of said issues the examination of any long, or any account whatever, will be necessary. Whether a particular item was included in an account, or not, is a question as to a simple, single fact; not a question involving the examination of a long account, within either the letter or the spirit of section 271 of the Code. 3. To warrant a compulsory reference, it must be made to appear that the examination of a long account is not merely contingently or incidentally involved—not merely involved in the event of the determination of any particular issue, in any particular way—but necessarily involved, no matter how particular issues may be determined or disposed of. (*Cameron v. Freeman*, 10 Abb. Pr. 333. *Graham v. Golding*, 7 How. Pr. 260. *Keeler v. Poughkeepsie &c. Plank Road Co.*, 10 id. 11. *Kain v. Delano*, decided in Court of Appeals.)

IV. The court had no power to order a compulsory reference in this case; and the order of reference should therefore be reversed.

Ludlow v. American Exchange National Bank.

T. C. T. Buckley, for the respondent.

I. By the express terms of section 271 of the Code, a reference may be ordered. (1.) When the trial requires the examination of a long account on either side. (2.) Or when the taking of an account is necessary for the information of the court before judgment.

II. Irrespective of the pleadings, the plaintiff's affidavit brings this case within the provisions of the section. The affidavit of the defendants' cashier, does not, as did the affidavit referred to in the opinion of Allen, J., in the case of *Kain v. Delano*, in the Court of Appeals, "circumstantially and fully deny the statement" contained in the moving papers, but merely states in general terms that the "investigation will require the decision of difficult questions of law." This is insufficient; the questions should be specified. (*Anonymous case*, 5 Cowen, 423. *Dewey v. Field*, 13 How. 439.)

III. This is not in any respect like the case of *Kain v. Delano*, recently decided in the Court of Appeals, on which the defendants seem to rely. In that case the plaintiff's claim was a written contract for the recovery of a single sum of money, and the defense rested on a single fact, entirely distinct from any accounts. This is an equitable action to redeem stock, and by its very nature involves, and necessarily requires, the examination of and taking an account. Such account, in any aspect of the case, is necessary to be taken before judgment. As between the plaintiff and the Ohio Life Insurance and Trust Co., for the purpose of ascertaining whether the company had the interest they claimed. As between the receiver of the Ohio Life Insurance and Trust Co., the plaintiff and the defendants, to ascertain whether the amount for which the plaintiff concedes the defendants had the right to hold the certificate in question has ever been discharged. As between the plaintiff and defendants, to ascertain whether the payments referred to in the fourth article of the complaint,

Ludlow v. American Exchange National Bank.

have been reimbursed, and if not, how much is due thereon. The existence of these facts material to the issue, though there may be other questions of fact, authorizes the court to order a reference. (*Van Zant v. Cobb*, 10 *How.* 348.)

IV. The opinion of Judge BRADY on the motion for a stay, in this case, fully sustains the above view.(a)

By the Court, CARDOZO, J. Judges BARNARD and BRADY have both held this case to be referable. I think they are right. The complaint, in the 3d and 4th sections, shows that the property, the subject of the suit, was to be held and applied not only in liquidation of the indebtedness mentioned in the complaint, but of all future advances which the defendants might make; that further advances were made, by the bank, by payment of calls on the certificate which it is sought to redeem; and an account will have to be taken of these advances, and also of the payments made by the plaintiff. This account is necessary to

(a) The opinion referred to is as follows:

BRADY, J. Whether the plaintiff can maintain this action depends upon his ownership of the certificate, which he claims. Whether it is his property depends upon his payment to the Ohio Life and Trust Co. of the moneys used by him, and by which it is alleged the certificate was purchased.

To determine these facts the examination of a long account seems necessary. The question of ownership, owing to the peculiar relations existing between the plaintiff and the Ohio Life and Trust Company, and of which the defendants avail themselves by answer, must rest upon the condition of the accounts between them at the time the transfers were made by him, and hence the necessity of examining these accounts. The defenses are not predicated upon the plaintiff's ownership of the certificate. They are based upon the charge that the plaintiff appropriated the moneys of the Ohio Life and Trust Company, and with them purchased the certificate.

The plaintiff, before they can be called upon to show any of their defenses, must establish his right to maintain the action, and cannot do so without an investigation of accounts. This is my view of the pleadings, thus briefly stated.

I think this motion for a stay should not be granted; but liberty is given to apply to the justice who granted the order of reference.

Marshall v. McGregor.

be taken before judgment, and, I think, makes the case referable. And if so, the discretion of the judge granting the motion should not be reviewed on appeal.

I am for affirming the order.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 3, 1871. *Ingraham*, P. J., and *Cardoso* and *Geo. G. Barnard*, Justices.]

• • •

MARSHALL and others vs. MCGREGOR.

In this State a sheriff, on attachment or execution against one of several partners, may take possession of the partnership property, sell the interest of the debtor in it, and deliver the property to the purchaser.

Hence, where an attachment has been issued against the property of one of several joint owners of a ship, at the suit of an individual creditor, upon which the sheriff has seized and taken possession of the ship, an injunction will not be issued in behalf of the other joint owners, to restrain the creditor and the sheriff from continuing in possession of, or detaining, the ship.

A PPEAL by the plaintiffs from an order made at a special term vacating an injunction.

The plaintiffs are owners of fifteen-sixteenths of the ship *James Foster Jr.*, belonging to the port of New York, and being one of the old line of Liverpool packets of which C. H. Marshall & Co. are agents and ship's husbands. The ship runs regularly between New York and Liverpool. On the eve of her departure for Liverpool, on February 10, 1871, the vessel being fully loaded and ready for sea, hatches down, &c., with cargo on board belonging to different shippers, for which bills of lading were outstanding, the sheriff of New York, under a warrant of attachment against the property of one William Hatten, as a non-resident, issued by a judge of this court, in an action for the recovery of \$2500 and interest, seized one-sixteenth of said ship, but took possession of the

Marshall v. McGregor.

vessel loaded as aforesaid. Nearly a month prior to the issuing of the attachment, (January 17, 1871,) the defendant had come to the ship with Hatten, his debtor, and claimed to take possession as mortgagee, of this same one-sixteenth interest, and, according to the plaintiffs' complaint and affidavits, did take possession thereof, and also gave out and threatened that he would keep the ship in port until his mortgage was paid, and that this suit was an execution of such threats. The defendant denied these allegations, but did not deny the attempted taking of possession, &c.; and it was claimed by the plaintiffs that this was an effort to coerce the owners of the remaining fifteenth-sixteenths into paying a debt of their co-owner to relieve the vessel and cargo from the embarrassment and delay of a seizure. The statute regulating attachments against non-resident debtors, &c., provides for the giving of security by the attaching creditor to pay damages for detaining a vessel where cargo is attached, but there is no similar provision in the case of attachment of an interest, however small, in a vessel. (2 R. S. [4.] § 13.) The plaintiffs could not apply for an order of sale of the interest until thirty days after the seizure. (2 R. S. [7.] § 26.) The plaintiffs being thus remediless under the statute, and the injury by a detention of the whole vessel and cargo being claimed to be irreparable, they commenced this action, in which they offered to give security for the full value of the interest attached, and applied for an injunction restraining the attachment creditor and the sheriff from taking, holding, or detaining the ship, or any interest, or continuing to hold or detain said ship, or any interest therein, under or by virtue of the attachment. A temporary injunction was granted on the giving of a bond in \$7500.

A motion to continue the injunction was afterwards made, and denied. The following opinion was given at the special term.

Marshall v. McGregor.

CARDOZO, J. The equity which the complaint presents—that the suit of the defendant was brought without right and simply to coerce the plaintiffs into paying or securing the defendant's claim—is fully denied by the opposing papers. That being disposed of, I think there is neither precedent nor principle for the injunction issued in this case.

Undoubtedly a court of equity will interfere to prevent a ship from sailing, against the objection of an owner of a share, until the value of that share has been ascertained and security given for it. (*Abb. on Shipping*, 104.) But that is a very different thing from what has been done here. The hardship upon the other owners does not alter the case. They are in no worse position than that of any other copartner whose associate failed to pay his individual debt. It is one of the risks which copartners take, and they cannot shift that risk from themselves over to the creditor.

The hardship to the plaintiffs is no reason why the creditor should not have the right to sue his debtor and to employ all the provisional remedies for his aid that the law affords. They knew he could do so when they consented to own property jointly, and having taken the risk they must bear the consequences. A person might as well claim, which it is well settled he cannot do, (13 *Abb. Pr.* 317,) to restrain the sheriff from taking possession of partnership property upon attachment or execution against one partner, because of the great harm the other partner would suffer by its removal, as to pretend that an injunction to remove the attachment in the case of the defendant should be allowed. The fact that the property is a ship makes no difference. The motion must be denied, and the injunction vacated, with costs.

From this order the plaintiffs appealed.

Marshall v. McGregor.

Wm. Allen Butler, for the appellants.

I. An interest in a vessel creates a tenancy in common, and not a partnership interest. (*Story on Part.* § 417, *n. Bishop v. Edmiston*, 16 Abb. 466.)

II. Being such an interest and liable to attachment, the sheriff could not enforce the attachment except by seizing the whole, and this involved taking and holding the entire cargo, in which the attaching creditor had no interest whatever; but which all the owners were bound by the outstanding bills of lading to carry at once to Liverpool, and of which the master and ship's husband were custodians for the benefit of all concerned.

III. The common law and the statutes of New York furnish, therefore, no means by which the master and owners of this vessel could relieve the vessel and cargo from the detention and consequent damage caused by the attachment.

IV. Hence it was a plain case to invoke the aid of the court on its equity side, and this was the sole means of at once amply securing the attaching creditor for his lien, and relieving the vessel and cargo, and the owners (including the owner of the one-sixteenth) from the disastrous consequences of the attachment. The right of a majority of the owners, on giving security, to employ the vessel against the wish of a minority is well settled, and the same principle of permitting her employment by such majority, after attachment of a minority interest, on giving security under the direction of the court, will be applied. In *Buddington v. Stewart*, (14 Conn. 404,) the court says: "If the interest of one joint owner in a ship is attached, and the other owners are desirous of sending her on a voyage, we see no difficulty in compelling them to give security for the lien acquired by the attachment."

V. The plaintiffs tendered full security (besides the undertaking already given;) and the court being able to make any direction in the premises to secure the attach-

Marshall v. McGregor.

ing creditor's rights, and being satisfied as to the security, the right to an injunction was clear.

VI. The defendant became mortgagee of the one sixteenth, with full knowledge that this vessel was in the regular Liverpool packet service; that C. H. Marshall & Co. were her agents. His rights and equities are therefore to be viewed in connection with this fact. He knew that the vessel was loading for Liverpool. He made no objection, but lay by until just as she was about to sail, and then seized the ship fully loaded with cargo. This was manifestly unfair, and an abuse of the process of the court.

VII. The above points are wholly irrespective of the further question whether the defendant could attach. This is the issue for the trial. It is plain that the injunction should have been retained until the trial.

The sheriff could not have been treated as a trespasser. (*Smith v. Orser*, 42 N. Y. 132.) But the execution of the warrant of attachment involved taking possession of the entire vessel with cargo on board. As the sheriff claimed no control over the cargo, the only alternative was to leave it on board until the other owners of the ship could apply for an order of sale of the interest attached, (*which could not be for thirty days, under the statute*), or discharge the cargo, and so break up the voyage. All the owners were bound by the outstanding bills of lading. In this dilemma, on the giving of adequate security, the injunction was the only possible means of perfectly protecting all parties.

Judge CARDOZO's opinion does not touch this view of the case. (*See Turner v. Smith*, 1 Abb. N. S. 304.)

Beebe, Donohue & Cooke, for the respondent.

INGRAHAM, P. J. The case referred to by me, on the argument, was that of *The National Bank of New York v. The New Orleans and Carrollton Railroad, et al.*, (N. Y.

Marshall v. McGregor.

Transcript, of June 2, 1871,) where it was held that the effects of a partnership belong to the firm, and not to the partners, each of whom is only entitled to a share of what remains after payment of the debts of the firm. That the extent of the right acquired by a purchaser was an interest in the surplus which might remain after its debts were paid.

In this State, a contrary rule was adopted, and the courts have uniformly held that the sheriff, on attachment or execution, might take possession of the partnership property, sell the interest of the debtor in it, and deliver the property to the purchaser. (*Goll v. Hinton*, 8 Abb. 120. *Smith v. Orser*, 43 Barb. 187; *S. C.*, 42 N. Y. 132.)

The decision in the United States Court seems better calculated to protect the rights of parties, but we are constrained to follow the decisions in this State.

As the attachment has been vacated, and the property discharged, there is no necessity for the injunction, which ever rule should be adopted.

The order appealed from should be affirmed.

GEO. G. BARNARD, J., concurred.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 8, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

IN THE MATTER OF THE PETITION OF MICHAEL TREACY, to vacate an assessment for paving Eighth avenue with trap block, between Forty-second and Fifty-eighth streets.

The statute of 1870 (ch. 883) is applicable to assessments made prior to its passage, and is not unconstitutional.

Where an application is made, since that statute, to vacate an assessment made previous to its enactment, it must be governed by the law as it now stands; and if it appears upon the hearing, that by reason of irregularities, the expense of the improvement has been unlawfully increased, the court should not *vacate* the assessment, but direct that it be *reduced* by the amount of the unlawful increase of expense included therein, to be ascertained and calculated in the manner pointed out in the statute. (§ 27.)

A PPEAL from an order made at a special term, vacating an assessment.

Michael Treacy presented a petition to the court, stating that at the date of the confirmation of the assessment hereinafter mentioned, the petitioner was and still is the owner of the lots hereinafter mentioned and described, and the party aggrieved by said assessment. That on the 15th day of May, 1868, an assessment for paving Eighth avenue with trap block pavement, between Forty-second and Fifty-eighth streets, in the city of New York, was confirmed by the board of revision and correction of assessments of said city, and imposed upon a certain lot therein known and distinguished by ward No. 36, in block No. 104, and that said assessment now constitutes a lien upon said lot. That said assessment was irregular and fraudulent, for the reason that there was included in said assessment, and assessed upon the property therein mentioned and described, including the lot aforesaid, a sum of money for work not authorized or called for by the ordinance in pursuance of which said assessment was laid, and for the further reason that said assessment was never confirmed by the common council of the city of New York. Wherefore the petitioner prayed that said assessment be vacated, and that the lien or liens created thereby, or by any sub-

In the matter of Treacy.

sequent proceedings, cease, so far as the same affect the lots of the petitioner, and that the commissioner of public works, collector of assessments and comptroller of the city of New York, be ordered and directed to cancel and discharge the same upon the records of their respective offices, so far as the same affect said lots.

Accompanying this petition was a notice, dated November 7, 1870, stating that it would be presented to the Supreme Court, at a special term thereof, to be held at chambers, at the city hall of the city of New York, on the fifth day of December, 1870, and proofs furnished of the several matters alleged in said petition; and a motion would thereupon be made that the prayer of said petition be granted.

Pursuant to said notice, the following proof was taken on the 5th day of December, 1870: 1st. It was proven that on the 15th day of May, 1868, the petitioner was, and now is, the owner of the property mentioned in the petition. 2d. The assessment for paving Eighth avenue with trap-block pavement, from Forty-second to Fifty-eighth street, was produced. This assessment was confirmed by the board of revision and correction of assessments on the 15th day of May, 1868, and is the same assessment mentioned and referred to in the petition herein. It appears by said assessment that an assessment was imposed upon lots known and distinguished therein by the ward No. 36, in block No. 104, to Michael Treacy as owner. It also appears by said list that there were 22,410 square yards of pavement laid, at a cost of \$2.57 per square yard, and that there is included in said assessment, and assessed upon the property owners, including the property of the petitioner, the cost of laying 11,622 square feet of new bridge stone, at eighty-nine cents per square foot, amounting to \$10,343.58, and that the whole of such assessment is \$73,336.01.)

The ordinance authorizing the pavement of said Eighth

In the matter of Treacy.

avenue, for the cost of which said assessment was laid, directed "that Eighth avenue, from Forty-second street to Fifty-eighth street, be paved with Belgian or trap block pavement, under such directions as shall be given by the Croton Aqueduct department, who may appoint an inspector thereon, and one of the city surveyors."

The assessment for the paving so authorized having been made, was entered in the street commissioner's office containing the record of titles of assessments, and the book in the office of the clerk of arrears containing the record of titles of assessments confirmed, with the date of such entry, the title of the assessment, and the date of its confirmation.

It was admitted that the bridge stones above mentioned were used in the construction of crosswalks at the intersection of the streets which cross Eighth avenue between Forty-second and Fifty-eighth streets, and that said bridge stones are of a different size and quality from Belgian pavement, and are more expensive. The assessment was never confirmed by the common council. Upon the foregoing proof, hearing was had before the Hon. Justice BRADY, at special term, on the 11th day of April, 1871, and thereupon an order was made, granting the prayer of the petition, and ordering and adjudging that the assessment for paving Eighth avenue with trap block pavement, between Forty-second and Fifty-eighth streets, in the city of New York, confirmed 15th of May, 1868, and imposed upon lot known and distinguished in said assessment by ward No. 36, in block No. 104, be and the same was thereby vacated, and that the lien or liens created thereby, or by any subsequent proceeding, cease, so far as the same affect said lot, and that the commissioner of public works, collector of assessments, and comptroller of the city of New York be, and they were each thereby directed to cancel and discharge said assessment, and said lien or liens,

In the matter of Treacy.

upon the records of their respective offices, so far as the same affect said lot.

From this order the mayor, &c., appealed.

Richard O'Gorman and A. J. Vanderpoel, for the mayor, &c., of New York, (appellants.)

I. The only question to be argued in this court, on this appeal, is whether the assessment should have been vacated or reduced pursuant to the statute, chapter 383, laws of 1870. 1. That statute was enacted on the 26th day of April, 1870, page 881, seven months prior to the initiation of this proceeding. Section 27, page 903, provides that if, upon the hearing of proceedings brought pursuant to the act known as chapter 338 of the laws of 1858, entitled, &c., "it shall appear that the alleged fraud or irregularity has been committed, the assessment shall be vacated or modified, as hereinafter provided. If, upon such hearing, it shall appear that by reason of any alleged irregularity the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified, by deducting therefrom such sum as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement."

It, therefore, seems plain that the remedy to be administered by the judge at special term, is that defined by the law existing at the time the petitioner brought his proceeding, viz., a reduction of the assessment. 2. The respondent will doubtless contend that the question is *res adjudicata* in this court, since the recent decision in the cases of *Eager*, (58 Barb. 557,) and *Remsen*, (59 id. 317.) Submitting to the decisions in those cases, we beg leave to suggest the following difference between the facts in those cases and the case at bar, which seems to have an important bearing upon the question whether the remedy

 In the matter of Treacy.

in this case shall be administered pursuant to the act of 1858, or pursuant to the act of April 26, 1870. Both the *Eager* and the *Remsen* petitions were presented, and the proofs taken, previous to the enactment of the act of April 26, 1870. The remedies had been initiated. In the *Eager* case the general term say: "We have heretofore held that the act of 1870 did not apply to cases which had arisen before the passage of the act, but that such act was prospective only in requiring the amounts erroneously assessed to be deducted." The case at bar was commenced in November, 1870, more than six months subsequent to the enactment of the law which defines the remedy which should be administered. The appellants, therefore, do not ask that the act should be interpreted and applied otherwise than prospectively. They ask that the appropriate remedy defined by the statute should be applied to a case initiated subsequently to the enactment of the statute. The operation and effect of the act of 1858, until modified by the act of 1870, was very burdensome and unjust. (*In the matter of Beams*, 17 How. 459. *In the matter of Palmer*, 40 N. Y. 561. *Litch v. Brotherson*, 16 Abb. 384. *Butler v. Palmer*, 1 Hill, 331. *Church v. Rhodes*, 6 How. Pr. 281.) 3. If the act be considered retrospective, as affecting the remedy to which the petitioner became entitled when the assessment was confirmed on the 15th day of May, 1868, it is yet valid, and properly applicable to the case at bar. "Retrospective acts which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not forbidden." (*Satterlee v. Mathewson*, 2 Pet. 413.) The statute in question does not affect any right of the petitioner; it merely prescribes the method of enforcing his right to be relieved of the illegal charge. His right is the same now as before the statute was enacted; under the new statute the same relief against his grievance is given in a more convenient and appropriate manner. Under the former statute of 1858, the entire

In the matter of Treacy.

assessment was directed to be set aside, and a reassessment laid for the amount properly chargeable; under the law of 1870, only the illegal charge is set aside, and the assessment reduced to the proper amount. The act in question affects the remedy only; it deprives the petitioner of no right to relief to which he was theretofore entitled. It should therefore be applied to all proceedings commenced subsequent to its enactment. (*Litch v. Brotherson*, 16 Abb. 392. *Aymer v. Gault*, 2 Paige, 284. *People v. Tibbets*, 4 Cowen, 384.) It is in the undoubted power of the legislature to enact remedial statutes having a retrospective effect. In *Calder v. Bull*, (3 Dall. 386, 391,) Chase, J., says: "There are cases in which the laws may justly, and for the benefit of the community and individuals, relate to a time antecedent to their commencement." (See also *Mann v. Eckford*, 15 Wend. 519; *Wilson v. Bap. Ed. Soc.*, 10 Barb. 308; *Syracuse City Bank v. Davis*, 16 Barb. 188; *Tate v. Stooltzfoos*, 16 Serg. & Rawle, 35; *Hepburn v. Curtis*, 7 Watts, 300; *Baugh v. Nelson*, 9 Gill, 299.)

II. The order should be modified in accordance with the act of 1870.

Charles E. Miller, for the respondent.

By the Court, CARDOZO, J. The question to be determined is, whether the statute of 1870 (ch. 383) is applicable to this petition. If it be not, then the order below vacating the assessment is right; otherwise the order below should be modified by directing that the assessment be reduced by the amount of the unlawful increase of expense included in the assessment, to be ascertained and calculated in the manner pointed out by the statute.

The act above mentioned was passed on the 26th of April, 1870, some months before the petition in this matter was presented. The cases relied on by the respondent's counsel are inapplicable. In *Eager's* case the proofs

 Burns v. The People.

had been taken previous to the passage of the statute, and in *Remsen's* case the petition had been presented. It was properly held that as to those cases the statute was inapplicable. But the matter is quite different now. The application here was made under the statutes as they existed when the petition was presented, and must be governed by the law as it stands now. That the statute is applicable to assessments made prior to its passage, and is not unconstitutional, is too clear to require the citation of authorities. The point was distinctly passed upon by Judge INGRAHAM in the *Matter of Beams*, (17 *How. Pr.* 459,) and I have quite recently gone fully over the subject and collated a large number of authorities, in the *Matter of Broadway*, decided at special term, in April last. The order below should be modified accordingly.

Order modified.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 3, 1871. *Ingraham*, P. J., and *Cardozo*, Justice.]

BURNS, plaintiff in error, vs. THE PEOPLE, defendants in error.

In an indictment for perjury at an election, a general averment of jurisdiction in the board of inspectors to administer the oath is sufficient, without stating in detail the names, or the number, of the inspectors who constituted the board. L

It is not a valid objection to such an indictment that it does not state that the inspectors of election in the ward before which board the alleged perjury was committed, were acting for such ward.

Nor is it a valid objection that the indictment does not show the manner and form in which the oath was administered, viz., that the defendant was sworn to tell the truth, or to truly answer such questions as should be put to him by said board, touching his right to vote. If it avers that the defendant was "duly sworn, and did take his corporal oath," it means that he was

Burns v. The People.

sworn according to the law applicable to such a case; and embraces all that is required in the statute.

Neither is it a valid objection to the indictment that it does not show upon its face that the oath required by statute was administered to the defendant; if it avers that he was duly sworn and took his corporal oath before the board, and that he falsely swore that he had not voted.

The averment that a general election was held, at, &c., pursuant to the laws and constitution of the State, before a board of inspectors legally constituted and authorized according to law, is sufficient, in respect to the place, without stating that the place mentioned in the indictment had been legally appointed.

✓ The rule is that assignments of perjury must be made by special averment negating the oath. A general allegation that the defendant swore falsely is not enough.

Where the false oath alleged was that the prisoner had sworn that he had not voted at the election, and the assignment of the perjury was that he had voted previously at said election, at the 4th ward, "at the house of T. L. W. in said ward," without stating that he voted before a board of officers duly constituted and authorized according to law, or that any lawful election had been appointed; *Held* that the assignment was too general and uncertain, and was not explicit enough to support itself, or to show that the defendant committed the crime. *POTTER, J.*, dissented.

In the absence of any averment to that effect, it will not be inferred that the election was lawfully held at the place named.

Such a defect is a substantial one, and not merely formal; and is not obviated by the statute of jeofails.

WRIT of error to the court of oyer and terminer of the county of Schenectady, to reverse a conviction for perjury at an election.

The indictment alleged, that on the 8th day of November, A. D. 1870, at the city of Schenectady, in the county of Schenectady, and State of New York, at a general election, held in said city and county aforesaid, for the choice of a governor, lieutenant-governor, a comptroller, two canal commissioners, an inspector of State prisons of the State aforesaid; for the choice of a member of congress from the eighteenth congressional district of the State aforesaid, and for the choice of a member of assembly, a county clerk, four coroners and one justice of sessions of the county aforesaid, held pursuant to the constitution and

Burns v. The People.

laws of this State, before the board of inspectors of elections of the second ward of the city of Schenectady aforesaid, then sitting at the house of "steamer engine company No. 4," in the second ward of the city aforesaid, which said board being then and there legally constituted and organized according to law to receive all legal and lawful votes or ballots for said officers to be elected as aforesaid, the defendant at the day and date aforesaid, and at the place last aforesaid, appeared before the board of inspectors of elections aforesaid, and offered his vote or ballot for some or all of the officers so as aforesaid to be chosen or elected; whereupon, before his vote or ballot was given in, he was duly challenged touching his right or legal ability to vote at said election for the said officers, so as aforesaid to be chosen or elected, and, on being challenged, he was then and there duly sworn and did take his corporal oath before the said board, so constituted and sitting as aforesaid, the said board being then and there duly authorized and empowered to administer an oath to Barnard Burns, the defendant, in that behalf, and he, the said Barnard Burns, being then and there sworn by and before said board, and, not regarding the laws of this State, nor having the fear of God before his eyes, but being moved, &c., did then and there falsely, willfully, feloniously and corruptly say, depose and swear, to and before the board aforesaid, touching his right to vote, and his qualifications as an elector and voter at such election for the choice of the officers so as aforesaid to be chosen and elected, in substance and effect as follows, among other things, that he, the said defendant, had not voted at the election aforesaid; whereas, in truth and in fact, he, the said defendant, had voted at the election aforesaid, to wit, previously and on the day aforesaid, at the fourth ward of the city aforesaid, at the house of Thomas L. Wasson, in said ward and city, and for the officers to be chosen as aforesaid. And that the said Barnard Burns, on 8th day

Burns v. The People.

of November, A. D. 1870, at the city and county of Schenectady, and State of New York, did commit willful and corrupt perjury, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

The defendant, being arraigned, pleaded not guilty.

On the trial, the defendant's counsel moved to quash the indictment on and for the several grounds hereinafter set forth. The court overruled each and every exception of the defendant's counsel to the said indictment, to each of which the defendant's counsel excepted.

Under the above ruling of the court, the defendant pleaded guilty. The defendant's counsel then moved to arrest judgment against said defendant on the ground that the indictment was defective in the following particulars, (the same as above referred to for quashing the indictment) :

1. That the indictment does not state the number of inspectors of election ; so that the court may see that the board of inspectors was legally constituted.

2. That the indictment does not state that the inspectors of election in the second ward of the city of Schenectady, before which board the alleged perjury was committed, were acting for such second ward.

3. That the indictment does not show that the defendant was sworn to tell the truth, or to truly answer such questions as should be put to him by said board touching his right to vote.

4. That the indictment does not show upon its face that the oath required by statute was administered to the defendant, or that he falsely swore to any part thereof.

5. That the indictment does not show that "steamer engine house number 4," the place mentioned in the indictment, was the legally appointed and duly constituted place for holding elections in said second ward.

6. That the indictment does not show that "the house of Thomas L. Wasson," the place mentioned in the in-

 Burns v. The People.

dictment, was the legally appointed and duly constituted place for holding elections in the fourth ward of the city of Schenectady, or that any legal election was then holden, at such house.

The court overruled each and every of the above exceptions to the indictment, and the defendant's counsel excepted.

Robert Payne, for the plaintiff in error.

I. The indictment does not state the number of inspectors of election, so that the court may see that the board of inspectors was legally constituted. 1. A board of inspectors of elections is a tribunal of special and limited jurisdiction, and the facts warranting its exercise of authority must be pleaded. In no case is it sufficient to allege, in general terms, that such a tribunal has jurisdiction, without an averment of facts constituting the same. (*Ladbrooke v. James*, Willes, 199. *Sollers v. Lawrence*, Id. 416. *Dakin v. Hudson*, 6 Cowen, 221. *Cleveland v. Rogers*, 6 Wend. 438, and cases cited. *Lawton v. Erwin*, 9 id. 233. *Sackett v. Andross*, 5 Hill, 327. *People v. Koeber*, 7 id. 39. *Cornell v. Barnes*, Id. 37, n., and cases cited. *Turney v. Roby*, 3 N. Y. 193. *People v. Powers*, 6 id. 50. *People v. Weston*, 4 Park. Cr. Rep. 226. 1 Chit. Cr. Law, ed. 1819, p. 138. *Elkin v. The People*, 28 N. Y. 177. *Barnes v. Harris*, 3 Barb. 603. *Ayres v. Covill*, 18 id. 260.) 2. The indictment does not state that the inspectors of election in the second ward of the city of Schenectady, before which board the alleged perjury was committed, were acting for such second ward.

II. A board of inspectors of election, being a tribunal of special and limited jurisdiction, have territorial jurisdiction only in and for that district or ward in and for which they are legally sitting and acting, and the omission to aver facts showing territorial jurisdiction, such as that they were duly elected and organized, and the constitu-

Burns v. The People.

tional oath administered to said board in pursuance of the statute, is fatal to the indictment. (*Election Laws, tit. 3, art. 3, § 21; and tit. 4, art. 1, §§ 1, 2, &c., and cases above cited.*) 3. The indictment does not show that the defendant was sworn to tell the truth, or to truly answer such questions as should be put him by said board, touching his right to vote. 4. The indictment does not show upon its face that the oath required by statute was administered to the defendant, or that he falsely swore to any part thereof.

III. and IV. The statute prescribes certain oaths to be administered to a person challenged, and certain formula for the guidance of inspectors, and the criminal pleader must incorporate in the indictment at least the violated portion of the oath, either in words or effect, and must allege that the proceedings prescribed in the formula were had, or the indictment will be insufficient. (*Election Laws, tit. 3, art. 2, §§ 13-18, and cases above cited.*)

The indictment does not show that "steamer engine house No. 4," the place mentioned in the indictment, was the legally appointed and duly constituted place for holding elections in said second ward.

The indictment does not show that "the house of Thomas L. Wasson," the place mentioned in the indictment, was the legally appointed and duly constituted place for holding elections in the fourth ward of the city of Schenectady, or that any legal election was then holden at such house.

V. and VI. The statute makes it the duty of common councils of cities, to designate on the first Monday of every October, the place in each election district in such city, at which elections shall be held during that year, and to give public notice thereof. This indictment does not allege, even in the most general terms, that either of the places at which this defendant is alleged to have voted, or that the place at which the alleged perjury of this defendant was committed, was in any manner authorized or designated

Burns v. The People.

as the place for holding such elections, and is therefore bad. (*Election Laws, tit. 3, art. 3, § 18, and cases above cited.*)

E. W. Paige, for the defendants in error.

I. The indictment states that "said board was then and there duly authorized and empowered to administer an oath to the said Barnard Burns in that behalf," and that is sufficient. (*The People v. Tredway*, 3 Barb. 473. *The People v. Phelps*, 5 Wend. 19. *Campbell v. The People*, 8 id. 637.) In *Campbell v. The People*, an indictment in the precise form of this, down to the assignment, was sustained. This meets the 1st, 2d and 5th objections.

II. The indictment states that Burns was "duly sworn," and did "take his corporal oath;" either of which is sufficient. (*State v. Farron*, 10 Rich. 165. *Dodge v. State*, 4 Zab. 455. *Tuttle v. The People*, 36 N. Y. 436. *Respublica v. Newell*, 3 Yeates, 407.) Besides, our statute of oaths does not require an affiant to be sworn to tell the truth, or to answer truly. This meets the 3d objection.

III. As to the fourth objection. The indictment is drawn under the general statute of perjury, and not the election law, but, if otherwise, it is only necessary to set forth the part of the oath to be negatived by the assignor. (*Campbell v. The People*, 8 Wend. 638.)

IV. As to the 6th objection: 1. The rule as to assignments is that the indictment must negative the oath by special averment. "Whereas in truth and in fact," &c. The rule then branches. If the oath be of a particular fact, negativing that fact in the words of the oath will be sufficient. But if the oath be general, and the assignment as general in the negative; as if a man swear that he has paid all his debts, and the assignment be that he has not paid all his debts; this would be bad for want of certainty, as it would afford the defendant no information of what was intended to be proved, but the assignment must show in what respect or in what instances he has not done so.

Burns v. The People.

(2 *Archb.* 600.) Lord Ellenborough says, (*Rex v. Perrott*, 2 *M. & S.* 386:) "Suppose the offense had branched out into twenty or thirty matters of pretense, of which some might be true, and used only as the vehicle of the falsity, are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole." The assignment here negatives the oath in its words, and if the oath state a particular fact only, that is sufficient. If the oath had read: "He had voted at the election," it would undoubtedly have been single, and the question is narrowed to this; whether the negation of a particular fact makes a multifarious statement. If it do not, the assignment that "he had voted at the election aforesaid," is good without specifying time or place. 2. This construction follows the precedent of the election law. The assignment negatives the words of the statute. 3. Granting the oath to be general, the assignment points out a single act sufficiently. It tells what Lord Mansfield called an intelligible story. The defendant could not "have voted, at the election aforesaid," and "for the officers aforesaid," and have done all these things at the house of Wasson, in the fourth ward, unless Wasson's house "had been the legally appointed and duly constituted place for holding elections in the fourth ward of the city of Schenectady," or unless a legal election had been held at such house. The words *vote* and *election* are complete in their signification, otherwise the oath prescribed by statute would be bad. And the averments of time and place give the defendant all possible information of what is intended to be proved. 4. The matters stated in the sixth objection are matters of form, within the meaning of the statute of jeofails. "The indictment contains the substance of the offense,

Burns v. The People.

with the circumstances necessary to render it intelligible, and to inform the defendant of the allegations against him." (5 *Wend.* 20. 8 *Barb.* 551. 22 *N. Y.* 150. 6 *id.* 62.)

V. If the use of the negative makes Burns' oath multifarious in this indictment, though it does not have that effect in the election law, the people are bound, in assigning the perjury, to show a special act of voting. This is done in the indictment; but it is done in such an informal manner that if it were tested by the strict rules of criminal pleading in force before the statute of jeofails, it would, perhaps, be insufficient. The question is, then, whether the assignment of a special act of perjury must be stated, with the formal precision which those rules require; and it is submitted that no such precision is required, or ever has been required. The rule laid down by all the authorities is that the acts must be set forth in such a manner as to "afford the defendant information of what is intended to be proved." Before 1814 it was always sufficient to negative the words of the oath. See *Rex v. Atkinson*, decided in 1785, (*Deac. C. L.* 1017; and *Bacon's Ab. tit. Perjury, C.*) where the oath was that the defendant "never did, at any time during his transactions with the commissioners of the victualing office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners, as their cornfactor;" the assignment alleged that the defendant did charge more than sixpence per quarter for and in respect of such malt and grain so purchased; and it was held to be good. In 1814 the king's bench, in the case of *Rex v. Perrott*, (2 *M. & S.* 380.) in deciding a case of false pretences, construed the 23d *Geo.* 2, *ch.* 11, which reads that it shall be "sufficient to set forth the substance of the offense charged, together with the proper averments to falsify the matter wherein the perjury is assigned," in this way; that the words "proper averments" meant specific charges, "in order to

Burns v. The People.

give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood."

In 1825 it was held by Abbott, Ch. J., at *nisi prius*, (*Rex v. Hopper, Ry. & M., N. P. C.*, 210,) that where the defendant swore he had inserted in his schedule, under the insolvent debtors act, all debts due to him, the assignment must state what debt he is charged with omitting. The judge says: "If the assignment of perjury does not *at all* state what debt the defendant is charged with omitting, how can he possibly be prepared to make a defense." And upon the authority of this case, the rule is laid down in *Archbold*, vol. 2, p. 966, (*Banks & Bros. 7th ed.*) as follows: "If the statement be general, and the assignment is general in the negative—as if a man swear that he has paid all his debts, and the assignment be that he has not paid all his debts—this would be bad for want of certainty; for it would afford the defendant no information of what was intended to be proved; but the assignment must show in what respect, or in what instances, he has not done it. These are all the cases except *Rex v. Parker*, to be noticed presently.

To recapitulate: The case of *Rex v. Atkinson* proves one of two things; either that a negative oath is not multifarious, in which case this indictment is certainly good, and the other cases are not inconsistent with it; or else that in 1785 it was sufficient to negative a multifarious oath in its words. If the latter, then the rule is changed by *Rex v. Perrott*, and *Rex v. Hopper* amounts to nothing more than this; that the special act assigned must be so stated that the defendant may know what is intended to be proved against him; in which case, again, this indictment is good. Besides, the case of *Rex v. Perrott* is upon a question of false pretenses, and so cannot be called a

Burns v. The People.

decision upon a question of perjury; and *Rex v. Hopper* is nothing but a *nisi prius* case.

It is perhaps proper to say that the law of 1785 is the law of this State, and that subsequent decisions in England are not controlling here.

Once more; the assignment states that Burns voted at the house of Thomas L. Wasson, &c., at the election aforesaid, and the previous description of the election is so full and ample that, it is submitted, everything else is matter of form within the statute of jeofails, and the decisions above cited, and general words are sufficient where the certainty lies within the defendant's knowledge. (*Com. Dig. "Pleader," C. 26.*)

VI. At all events, the defect is cured by the plea of guilty. The defendant should have demurred, as was held by Lord Chief Justice Tindall in *Rex v. Parker*, (1 *Car. & Marsh.* 639.) There the oath was that the defendant had paid, in full, all his creditors but two, and the assignment was that "the creditors were not all, with two exceptions, paid by the defendant in full." At the trial the prosecution attempted to prove debts not paid, and of course not specified in the assignment. To which it was objected that the assignment did not set them forth. But it was held that if the assignment was too general, the defendant should have demurred, and since he had not done so, the evidence must be admitted. (*Pp.* 643, 644.) And that bad assignments shall be aided after verdict, was decided in 2 *John.* 125, and *Skin.* 344.

A motion to quash lying in the discretion of the court, and granted only where a motion in arrest would be granted, (1 *Archibold's Pl.* 237, *Banks & Bros.* 7th ed.,) and not being the subject of exception when refused, (*Id.* n. 1,) cannot embarrass the people, upon a writ of error.

MILLER, P. J. The first objection urged to the indictment is, that it is defective because it does not state the

Burns v. The People.

and authorized according to law, was sufficient, I think, without stating that the place had been legally appointed.

The sixth objection relates to the assignment of the perjury. The false oath alleged was that the prisoner had sworn that he had not voted at the election. The assignment was that he had voted previously at the fourth ward, "at the house of Thomas L. Wasson, in said ward," without stating that he voted before a board of officers duly constituted and authorized, according to law, or that any lawful election had been appointed, or was held, at the place named. The rule is, that assignments of perjury must be made by special averment negating the oath; a general allegation that the defendant swore false, is not enough. (1 *Arch. Crim. Plead.* 538, § 297, 4th *Am. ed.*) If the assignment had stated that the defendant had previously voted at the election, clearly it would not have been sufficient; as such an averment is not specific, and does not show that he had voted at an election unlawfully held, and does not furnish the defendant full information as to the character of the charge made. If the defendant had voted at the place named, and there was no authority to hold the election there, and no officers authorized by law to receive the vote, clearly the oath afterwards made would not constitute a willful perjury. The assignment of the perjury is too general and uncertain, and is not explicit enough, to support itself or to show that the defendant committed the crime. (*Clark v. The People*, 2 *Lansing*, 329, 331.) It is no answer to this view of the subject to say that he could not have voted as alleged at the place named, unless it was the legally appointed and duly constituted place for holding the election, or unless a legal election was held there. In the absence of any averment to that effect, it is not to be inferred, I think, that the election was lawfully held at the place named. It may have been held there without authority, and in violation of law, and as the contrary does not appear, the indictment does

Burns v. The People.

not present an intelligible story from which it appears that the crime of perjury has been committed. It is clearly defective in this respect, and for this reason cannot be upheld. The defect is a substantial one, and not merely formal, and is not obviated by the statute of jeofails. (1 R. S. 728, § 52.) The indictment does not contain the substance of the offense, with the circumstances necessary to render it intelligible, and inform the defendant of the allegations against him. (5 Wend. 20. 8 Barb. 552. 22 N. Y. 150. 6 id. 52.)

By reason of the defect named, the conviction must be reversed.

PARKER, J., concurred.

POTTER, J. I concur with the presiding judge in his opinion, except as to the sixth objection, upon the question of the assignment of perjury. The occasion, the time and place where the oath was taken, the authority of the officer to administer the oath, and the matter sworn to, were all well alleged, and fully and sufficiently assigned. The oath administered was prescribed by statute; it contained multifarious matters, but one distinct particular of which was charged as being false, to wit, *that you have not voted at this election*. And the falsity was charged in this, to wit, that the said Barnard Burns had previously, and on the same day, *voted at the election aforesaid*; and then, with more particular specification, stated the ward, place in the ward, &c., *for the officers aforesaid*. This assignment is as broad, and more specific than the statute which creates the offense. The character of the election was fully stated; it was an election known to the law, and one at which the crime of perjury could be committed. It was an election at which the voter could vote but once, and it was the voting at the election more than once, with the falsity of the oath, that constituted the crime. At any

Burns v. The People.

other election, or before any body unauthorized to receive his vote, it is true no crime would have been committed, and no offense could be made to sustain the indictment but a previous vote at *the* election, to wit, the election that had been described. This was the offense charged. The oath, and the matters it contained, having been sufficiently alleged, the only point of law is, was the falsity of this oath sufficiently stated? Upon this point I cannot concur in the opinion just read. As to the allegation of falsity, I understand the rule to be, that it must be set forth in such a manner "as to afford the defendant information of what is intended to be proved." This was sufficient, even before our statute of jeofails. What was the crime? Having previously voted at that election? Certainly not. The previous voting might have been lawful. What was the oath? That he had not previously voted; and swearing to this was the crime; and this is what the indictment charged. Of what does the indictment inform him? That he had so previously voted. And it goes further, and beyond this, and informs him of the very place in another ward of the same city where he had so voted, *at that election*; that is, the election which was well set forth. This is more specific than the terms of the law; more specific than the terms of the oath. Of what sensible importance is it that the prisoner should be informed that the persons who received his first vote, were duly authorized to receive it? The crime charged did not consist in voting the first time; that was no part of the offense necessary to be described. It was not the substance of the offense. The legal presumption is that his first vote was a legal vote. Whether it was, or not, was not an issue on the trial. The defendant is not permitted to deny it; the people were not bound to prove it to have been legal. When they proved that he had personally voted at the election, the burden was upon the defendant to impeach its validity. He had assumed it to be legal by

Burns v. The People.

voting. The crime was, in swearing he had not before voted at that election; and this was fully set forth. It may be assumed that he had a right to vote where he first voted. The people have not, by their indictment, complained of that vote. It does not lie in the mouth of the prisoner to say he had no right to vote there. That fact has no materiality or importance, beyond the fact of showing that his oath was false. The fact that he had voted is sufficiently stated; and it gave the defendant notice that his perjury was in swearing that he had not so voted. There are two rules of pleading that sustain this assignment of perjury as contained in the indictment. First. In statute offenses, if the statement be of a particular fact, negativing that fact is sufficient; and this rule is laid down as to pleading, in perjury. (2 *Arch. Crim. Plead.* 966.) Second. That the falsity must be set forth in such a manner as to afford the defendant information of what is intended to be proved; and this is held to be sufficient. Both these rules have been observed in this case. There is a class of cases found in the books, which lay down the rule given in the opinion read; but they can be distinguished, and are distinguished, by this: Where the false statement or words of the oath assigned, is general, it is not sufficient to make the *general* allegation that such statement was false, but the *particulars* in which it is false must be alleged. In such case they are of the substance, and are therefore material. But where the perjury consists in a single or particular statement, it is sufficient to assign, generally, that such particular statement is false. But the case is otherwise where the false words assigned are particular, or specific; and in such case the assignment may be general, if the general words bring home to the defendant's knowledge the certainty of what is to be proved. So the rule is laid down by *Comyn*, that general words are sufficient where the certainty lies within the defendant's knowledge, (*Dig. Pleader*, 26;) and in *The People v. Phelps*,

Burns v. The People.

(5 *Wend.* 120,) it was held sufficient, if all the circumstances necessary to describe and render the charge intelligible in its legal requisites, appear on the face of the proceeding, and inform the defendant of the charge against him. (*Biggs v. The People*, 8 *Barb.* 551.) The defect complained of here could not tend to prejudice the prisoner. (*The People v. Powers*, 6 *N. Y.* 50. *Sanchez v. The People*, 22 *id.* 150.) The assignment of falsity in this case, gave the defendant full notice of the particulars in which his oath was false; giving time, place, and voting at the election aforesaid. I have been compelled to come to the conclusion that this assignment was full and sufficient. Besides, the technicalities of pleading, in indictments, are inapplicable, under our Revised Statutes. Objections can only be taken to defects of substance, not to matters of form, unless they tend to the prejudice of the defendant. That cannot be alleged in this case. The indictment contains all the substance of the offense, with all the circumstances necessary to render it intelligible to the defendant, as to what was to be proved against him. I think it is good. But if these objections had merit in them, they are unavailing after judgment; especially after a plea of guilty.

I think the judgment should be affirmed.

Conviction reversed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

WOOD vs. BELDEN.

In an action to recover a balance of an account for carriages sold to the defendant, repairs, &c., in which account the defendant is credited with the proceeds of the sale of a landau left with the plaintiff by the defendant for sale on his account, the defendant, under an answer containing a general denial, may prove any claim which he may have against the plaintiff for selling the landau contrary to orders limiting the price.

Hence it is erroneous to charge the jury that the items relating to the landau are withdrawn from their consideration, except as to the price agreed to be paid for it, and for repairs.

Interest can be charged upon an account only from the time the account is rendered. It is not allowable upon the various items thereof from date.

A PPEAL by the defendant from a judgment entered on the verdict of a jury.

This action was brought to recover for "goods, wares and merchandise, carriages, wagons, sleighs and cutters," and for "labor and services" rendered, and "materials furnished in making repairs on such vehicles, and disbursements paid thereon, and a carriage sold on commission, all reasonably worth \$5154.15." The complaint further alleges that there is now due and owing \$2255.65, with interest. The answer contained a general denial.

The principal matter in controversy upon the trial related to the sale by the plaintiff of a landau belonging to the defendant. This landau had been sold by the plaintiff to the defendant for \$2000, and was sold by the plaintiff on the defendant's account, upon commission, for \$898.50, net. The defendant, having bought the landau, after using it three or four times, finding it too heavy, sent it back to the plaintiff to be sold. The plaintiff's salesman, Pray, testified that the defendant authorized him to sell it for \$800; that upon presentation of the bill crediting the proceeds of the landau, the defendant objected. The defendant testified that he told Pray that he was not pleased with the carriage, it was too heavy, and he would not submit to any material reduction in selling it, and never authorized him to sell it at \$800; that Pray

Wood v. Belden.

told him it could be sold without any sacrifice; that he, the defendant, told Pray he would submit to some sacrifice, but that he never authorized a sale at \$800, and did not know the carriage had been sacrificed at \$800 till the bill in question came in.

At this stage of the case, the defendant offered to show that the landau was disposed of by the plaintiff without authority, and against the defendant's orders, for a price far below its value, and to show what its real value was. This evidence was objected to, on the ground that no such defense was set up by the answer, and was excluded, and the defendant's counsel excepted.

The court, in charging the jury, withdrew from their consideration the matter of the landau, and to this the defendant excepted.

Dudley Field, for the appellant.

I. The principal point to be considered on this appeal, is whether, under a general denial, a defendant may show that an item of credit in the account is incorrect. The action is upon a balance of account. The answer traverses the correctness of the balance, and the court held in effect that under this answer no single item could be contested.

1. If the answer was insufficient as an entirety, to the whole account, or the whole balance of account, the plaintiff had his remedy by motion. (*Elton v. Markham*, 20 Barb. 343.) 2. It was, however, sufficient as a general denial, and being so, it was equally competent for the defendant to contest in detail each item comprising the account. (*Schermerhorn v. Van Allen*, 18 Barb. 29. *Andrews v. Bond*, 16 id. 633. *Raymond v. Richardson*, 4 E. D. Smith, 171. *Bellinger v. Craigie*, 31 Barb. 534. *Trimble v. Stilwell*, 4 E. D. Smith, 512. *White v. Spencer*, 14 N. Y. 248. *Dauchy v. Tyler*, 15 How. 404. *Quin v. Lloyd*, 41 N. Y. 354.)

II. The admission of evidence to prove interest upon

Wood v. Belden.

each item in the account, from the time the service was rendered or the sale made, was objected and excepted to, and the exception was proper. No principle is better settled than that interest does not commence upon a running account until the account is stated or rendered. (*Esterly v. Cole*, 3 N. Y. 502. *Salter v. Parkhurst*, 2 Daly, 240. *Wood v. Hickok*, 2 Wend. 501. *McKnight v. Dunlop*, 4 Barb. 36.)

C. A. Arthur, for the respondent.

I. The evidence offered by the defendant in regard to the landau was properly excluded by the court, on the ground that it was inadmissible under the pleadings. The complaint is for balance due on account, for goods sold, services rendered, materials furnished, &c. The answer amounts to a general denial. No evidence could be admitted to prove facts not set up in the pleadings. In all cases, new matter constituting either an entire or partial defense, must be pleaded, and if not pleaded, such matter cannot be given in evidence. (*McKyring v. Bull*, 16 N. Y. 297. *Sandford v. Travers*, 7 Bosw. 498. *Pier v. Finch*, 29 Barb. 170. *Bucknam v. Brett*, 13 Abb. Pr. 119. 35 Barb. 599. 22 How. Pr. 235.)

II. The court was right in charging the jury that the matter of the landau was not to be considered by them, in finding their verdict, for the reasons stated in the first point.

III. There was no misdirection in that part of the charge excepted to by the defendant, in which it is stated that if the repairs made by the plaintiff were proper, and were made upon the application, retainer or employment of the defendant, then he ought to pay for them. 1. It was claimed by the defendant that there was a warranty of the carriages sold him by the plaintiff, for a certain time, against imperfections of workmanship and material, and that a part of the repairs charged for in the plaintiff's

Wood v. Belden.

bill (four items, amounting to \$65.50,) were rendered necessary from such imperfections; and, under the warranty, no charge should have been made for them. Leaving out the matter of the landau, the whole amount in controversy was \$105; of this amount only \$65.50, charged for repairs, was claimed by the defendant to come under the warranty; being the items of February 1, April 9, and September 25. The item of July 7, \$40, for repairs on depot wagon, was not claimed to come under the warranty, but was for alterations made at the time the wagon was bought. The court charged the jury to turn their attention to the \$105, the amount in dispute, and if they thought, from the evidence in the case, that this \$105, or any part of it, ought to be deducted from the bill, they would make such deduction. That it depended entirely upon the view they (the jury) took of the evidence in the case, whether they gave the plaintiff the whole amount of his claim. That part of the charge holding the defendant liable for such repairs as were proper and necessary, and that he ordered, is applicable to the repairs not claimed to be under the warranty, and is to be construed in connection with the whole charge. "In considering whether a single proposition contained in a charge is erroneous, it is to be construed in connection with the context. The whole charge, or so much of it as is connected with and tends to modify or explain the part claimed to be objectionable, is to be considered in determining whether an error has been committed." (*Per Curiam, in Sperry v. Miller*, 16 N. Y. 407.) If the part of the charge excepted to was a mistake, it was cured by the express direction to the jury. (*Asby v. Rapelye*, 1 Hill, 9.) 2. The jury was not in any way misled by the part of the charge excepted to, because, in finding their verdict they actually did allow the deductions claimed by the defendant, to the extent of \$95.47, nearly the whole amount of them. There was no conflicting evidence whatever, as to the right of

Wood v. Belden.

the plaintiff to charge the interest claimed on his bill. It was proved to be properly charged. The deduction of \$95.49, made by the jury, must be presumed, therefore, to have been made from the items claimed to be deducted by the defendant. "Where a claim is made up of good and bad items, and there is a general verdict for the plaintiff, it will be intended, on a motion for a new trial, that the verdict was given on the good items only." (*Edwards v. Reynolds, Hill and D. Sup.* 53. *Phetteplace v. Steert*, 2 *John.* 442.) If there was any misdirection in the part of the charge excepted to, it evidently did not affect the result, and is, therefore, no ground for a new trial. (*Alston v. Jones*, 17 *Barb.* 276. *Gardner v. Clark*, *Id.* 538. *De Peyster v. Col. Ins. Co.*, 2 *Caines*, 85. *Mansfield v. Wheeler*, 23 *Wend.* 79.)

By the Court, INGRAHAM, P. J. The judge charged the jury that the items relating to the landau were withdrawn from their consideration, except as to the price agreed to be paid for it, and for repairs. Notwithstanding this, the jury allowed for it on the alleged sale by the plaintiff on the defendant's account. This was an error. The effect of it may have been to conclude the defendant as to any claim which he may have against the plaintiff for selling it contrary to orders limiting the price.

We think, also, interest should only be charged on the account when rendered, and not on the various items from date.

Judgment reversed, and new trial ordered.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 8, 1871. *Ingraham*, P. J., and *Cardozo*, Justice.]

HOLT and others vs. Ross, President of the Merchants'
Union Express Company.

L. & Co. drew a draft on the plaintiffs, to the order of F. and sent it by mail, addressed to F. at St. Louis. F. never received the draft, the letter containing it having been taken from the post office by some unauthorized person. The indorsement of the name of the payee, thereon, was a forgery. The draft, with the forged indorsement, was placed by one N. in the hands of the defendants, for collection, and they presented it to the plaintiffs, who, in ignorance of the theft and forgery, paid the amount to the defendants. The latter did not notify the plaintiffs that in making the collection they were acting as agents; and the defendants, before any demand upon them by the plaintiffs, paid over the proceeds to N. Held that the case was directly within the authority of *The Canal Bank v. Bank of Albany*, (1 Hill, 287;) and that the defendants were bound to refund the money.

APPEAL from a judgment entered upon the report of a referee.

The action was brought to recover back from the defendant the amount paid the defendant's company upon a certain draft or bill of exchange drawn on the plaintiffs, by their authority, on the 15th day of January, 1867, by the firm of Lamb, Quinlan & Co. of New Orleans, to whom the plaintiffs were indebted, for \$771.45, the amount of such indebtedness, payable to the order of one T. D. Ford, of St. Louis, Mo.; which draft or bill of exchange was forwarded by mail to said T. D. Ford, at St. Louis, Mo., and the letter containing the same was taken from the post office in St. Louis by some person other than the payee thereof; and thereafter the said draft was indorsed "Thomas D. Ford; pay to the bearer, Edward Duffy," by some person other than the payee thereof, and by a person who was not authorized to sign the name of the said payee, and who had no right or interest in said draft, or authority to receive, indorse or dispose of the same. Said draft was subsequently, and previous to the 29th day of January, 1867, delivered to the said defendant, the Merchants' Union Express Company, at Boston, for collection, by one A. W. R. Newton, and was transmitted in the

Holt v. Ross.

usual course of the business of said company, for collection, and presented to said plaintiffs for acceptance, and paid by them on the 29th day of January, 1867. Said express company being organized for the transaction of business usually transacted by express companies, among which was the collection of drafts and bills of exchange; and said company, at that time, being engaged in such business, between the cities of New York and Boston. The case was tried by a referee, and submitted upon a statement of facts admitted by stipulation.

The referee reported in favor of the plaintiffs, for the amount claimed, and from the judgment entered on the report the defendants appealed.

Rollin Tracy, for the appellants.

Robert Jackson, for the respondents.

By the Court, CARDOZO, J. Lamb, Quinlan & Co. drew a draft on the plaintiffs, who were indebted to them, for \$771.45, to the order of one T. D. Ford, and forwarded it by mail, addressed to Ford, at St. Louis. The draft never reached Ford. The letter containing it was taken from the post office by some unauthorized person, and the indorsement of the name of the payee of the draft was a forgery. The draft, with the forged indorsement, was placed by one Newton in the hands of the defendants for collection, and they presented it to the plaintiffs, who, being ignorant of the theft and forgery, paid the amount to the defendants, who did not notify them that in making the collection they were acting as agents, and the defendants, before any demand upon them by the plaintiffs, paid over the proceeds to the principal for whom they made the collection.

This statement of facts brings the case directly within the authority of *The Canal Bank v. Bank of Albany*, (1 Hill,

Sands v. New York Life Insurance Company.

287.) In that case it was held that though the defendants were innocent of any intended wrong, yet they had obtained the money of the plaintiffs on an instrument to which they had no title, and they were therefore bound to refund the amount, although they had no notice of the forgery until two months after they had transmitted the money to their principal. It was also held, in that case, that the defendants, though in point of fact acting as agents, might be regarded and treated as principals, because in the transaction of presenting and collecting the draft, they had acted as if they were principals, and had not disclosed the fact that they were mere agents.

That is precisely this case, and is decisive of it.

The case of *The Canal Bank v. Bank of Albany*, has been repeatedly reaffirmed and approved. (*Kingston Bank v. Eltinge*, 40 N. Y. 391. *Union Bank of Troy v. Sixth National Bank*, 1 Lans. 13.)

The judgment should be affirmed, with costs.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 8, 1871. *Ingram*, P. J., and *Cardozo*, Justice.]

STEPHANIE LUCY SANDS vs. THE NEW YORK LIFE INSURANCE COMPANY.

Where a New York life insurance company, at the commencement of the late civil war, had an agent, residing at Mobile, in the State of Alabama, to whom a person insured had been in the habit of paying the premiums, for several years; Held that the war did not suspend the agency, and that the payment of a premium to such agent, during the war, was binding upon the company, and had the effect to continue the policy in force.

A PPEAL from a judgment entered upon the report of a referee.

On January 28, 1850, the defendants insured the life

Sands v. New York Life Insurance Company.

of James Sands for \$5000, in consideration of the annual premium of \$160, to be paid in advance, on or before the 18th day of January, in each year. James Sands died July 12, 1862, having resided until his death at Mobile, in Alabama. This action was brought to recover the amount of the policy.

The following facts are undisputed, viz: 1. That the premiums were all duly paid to James M. Muldon, the defendants' agent at Mobile, from the commencement of the risk down to, and including the premium which fell due January 18, 1861, and were duly remitted by him to the defendants. 2. That on January 18, 1862, the said James Sands paid to said Muldon, who received the same without objection, \$160 in Confederate notes, as and for the annual premium payable on that day. 3. That Sands did not die by reason of any of the risks excepted in the policy, was never in any military service, but died of disease, and that the company had waived the clause in the policy prohibiting a residence at the south during the unhealthy months. 4. That Muldon had been appointed general agent of the defendants prior to 1850, with authority, among other things, to collect premiums, which he remitted at proper times to New York, and that his authority in that behalf was not restricted by any regulations as to delivery of receipts in any particular form, or authenticated in any particular way. That by a long settled custom of the company, all transactions with holders of policies in other States were conducted by and through their local agents. 5. That the defendants did not by any act of theirs revoke Muldon's authority prior to the payment of the last premium, in January, 1862, and that on the 21st day of August, 1861, they wrote him a letter upon the affairs of the company, requesting him to perform certain duties, as their agent. 6. That under and by virtue of the act of congress of July 13, 1861, and the proclamation of the President of the United States, dated August

Sands v. New York Life Insurance Company.

16, 1861, declaring the inhabitants of the rebel States, including Alabama, in a state of rebellion, a state of war existed from and after the last mentioned date, until the spring of 1865, between the United States and such rebellious States. That during the period of such rebellion, said James Sands (until his death) and said James M. Muldon; were public enemies of the United States and the citizens thereof. 7. That the plaintiff, by sufficient instruments of assignments, became owner of the policy before suit commenced, and that the proofs of death were duly made, August 18.

Upon the above facts the referee found, as matters of law:

First. That by reason of such state of war the said James Sands and the defendants became public enemies from and after the 16th day of August, 1861, until the death of the said James Sands, and the further execution of said contract of insurance during all that time became and was unlawful, and no right accrued to the plaintiff in consequence of the death of the said James Sands.

Second. That by reason of the occurring and existence of such state of war, the authority of said James M. Muldon to act for the defendants, and receive for them the premium of insurance on said policy, which became due and payable on the 18th day of January, 1862, had been and was revoked, and the payment to him at that time of such premium was not a payment to the defendants.

Third. That the defendants were entitled to judgment in their favor, and he ordered accordingly.

From the judgment so entered, the plaintiff appealed.

George De Forest Lord, for the appellant.

Three questions were discussed at the trial before the referee, and are considered in his opinion.

1. Did the existence of hostilities and the issuing of the proclamation of August 16, 1861, *ipso facto*, destroy the

Sands v. New York Life Insurance Company.

original contract of insurance, or render unlawful its preservation from forfeiture by further payment of premiums.

2. Did the same circumstances, *ipso facto*, revoke Muldon's authority as agent.

3. Was the payment of Confederate money a valid payment of the premium.

The first two questions must be answered in the negative, and the last in the affirmative, to entitle the plaintiff to recover. The referee decided all these questions in the affirmative, and dismissed the complaint, with costs.

I. Controlling decisions have now settled that payment in Confederate money, under circumstances similar to those here presented, is a valid payment. (*Robinson v. Intern. Life Ass. So.*, 42 N. Y. 54. *Thorington v. Smith*, 8 Wall. 1.)

II. The existence of hostilities between the federal government and the seceded States, as recognized and shaped by the act of July 13, 1861, and the proclamation of August 16, 1861, only rendered unlawful the carrying on of commercial intercourse, and did not either affect the validity of this contract, or render unlawful the payment of the future premiums to the defendants' agent at Mobile.

1. An insurrection like that of the Southern States neither assumes the character nor entails the legal consequences of war, until the government which is assailed, by some direct act recognizes it as such, and then only to the extent of such recognition. (*Leathers v. Com. Ins. Co.*, 2 Bush. 297.) The act of July 13, 1861, and the proclamation of August 16, 1861, (*See 12 U. S. Stat. at Large*, pp. 257, 1262,) were special and limited, both in terms and effect, and did not impart to the rebellion the unqualified characteristics of war, but simply prohibited "commercial intercourse," and prescribed penalties for disobedience. The "commercial intercourse" thus forbidden was evidently some "coming" and "going" of persons and property

Sands v. New York Life Insurance Company.

across the lines—something, in short, which could be licensed, supervised and controlled by the secretary of the treasury and his subordinates, like any other foreign trade. This act and proclamation, therefore, did not make unlawful anything which did not involve “commercial intercourse” (i. e. a passing to and fro) between the two sections of the country. No such intercourse occurred in this case; and, therefore, the plaintiff’s rights are not impaired by anything contained in that act or proclamation. (*Ward v. Smith*, 7 *Wall.* 452.)

III. But even assuming that the act of July 13, 1861, and the proclamation of August 16, 1861, gave to the rebellion all the characteristics and consequences of an international war, they would neither avoid this policy nor impair the effect of the payment of the premium on January 18, 1862. This proposition involves an inquiry into the effects of war: 1st. Upon contracts generally. 2d. Upon this contract in particular. 1. As to the effect of war upon contracts generally. Private international law, to which these questions belong, more than any other branch of jurisprudence, is free from technicalities, and rests upon broad principles of very varied application. Its rules, as generally stated, abound not only with exceptions, to which the principles enunciated do not apply, but those rules are themselves being constantly relaxed under the influence of modern civilization, the effect being to reduce to the lowest possible point the destructive effects of war upon individual rights. Each case, therefore, should be adjudicated in a liberal spirit, and with a sincere effort to uphold whatever the necessities of war do not absolutely require to be overthrown. 2. As to the effect of war upon this contract in particular. (a.) The policy was a pre-existent contract of perfect obligation when the war broke out. As much so as a bond or note would have been which fell due by its terms, either at a certain or an uncertain period, subsequent to August, 1861. Leaving,

Sands v. New York Life Insurance Company.

therefore, out of view for the present, the validity and effect of the payment of premium in January, 1862, if Sands had died prior to that date the plaintiff could have recovered. (b.) Although marine insurance does, life insurance does not, contravene any legitimate belligerent right. Every nation professedly seeks to accomplish and promote, by all means in its power, the destruction of its enemy's property at sea; but no civilized nation has ever sought the destruction of the lives of its enemies, except in the case of combatants in battle. Even, therefore, if life insurance could either prevent death or restore life, it would not, in the case of non-combatants, contravene any belligerent right. Every life policy would, of necessity, contain implied exceptions against death occurring, either, 1st. By the direct act of the government of the assurers—as, e. g., if Sands had been killed by a shell from the United States squadron, during the attack on Mobile—on the principle that no person shall incur liability by reason of the action of his own government, in the exercise of its legitimate powers. 2d. By reason of, or during the continuance of some known violation of law, as, e. g., if Sands had died from disease incurred while serving in the rebel army—on the principle that no illegal act can be made the foundation of a legal claim. These exceptions would be implied in accordance with familiar principles laid down in regard to marine insurance, in the following cases: *Kellner v. Le Mesurier*, (4 East, 396;) *Gamba v. Le Mesurier*, (id. 407;) *Brandon v. Curling*, (id. 410.) But no principle that has ever been laid down could carry the effect of war upon life policies beyond the limits of these exceptions. (c.) While marine insurance restores or replaces the thing insured, and is clearly a contract of indemnity, life insurance can never restore or replace the life insured; is not a contract of indemnity, because life can neither be valued nor compensated for, and is simply an agreement to pay a gross sum upon a contingency. The contract in

Sands v. New York Life Insurance Company.

its essence, so far as the effects of war are concerned, is undistinguishable from a bond or a note for the payment of money, and its true affinities are rather with contracts of annuity than with marine or fire insurances. "The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed, it is constant and unvariable." (*Parke, B., in Dolby v. India and London Life Ass. Co., 2 Smith's Lead. Cases, Hare & Wall. ed. 330.*) It is not essential to a contract of life insurance that it should be supported by periodical payments of premium. It may be, and sometimes is, made in consideration of a gross sum paid when the policy issues. (*Ellis on Fire and Life Insurance, p. 185.*) Had that been the plan adopted in this case, and had Sands paid a gross sum on procuring the policy, instead of agreeing to pay annual premiums, it would have been difficult to argue against this recovery. Yet it certainly cannot affect the nature of the contract, whether the consideration is paid in one sum or fifty. Ordinarily, these contracts are, in their real character, the purchase by the insurers of an annuity to be paid by the insured. The premium is the annuity; the amount insured is the price; and the nature of the contract cannot be affected by the fact that credit is given for the prices until the death of the assured. No reasons which have ever been given for declaring marine insurances void could apply to a contract of annuity. Neither can they to a life policy. (*d.*) Life insurance does not unlawfully contribute aid or comfort to the enemy. Although it secures to the assured contingent pecuniary advantages, it does not further any hostile enterprise, and numerous decisions declare that the mere accruing of pecuniary benefit to an enemy does not avoid a contract.

Sands v. New York Life Insurance Company.

(*Ex parte Boussmaker*, 13 Vesey, 71. *Buchanan v. Curry*, 19 John. 137.)

IV. The payment of premium, January 18, 1862, did not create a new obligation, or alter the character of the policy as a preëxistent contract. It was simply the performance of a condition requisite to prevent a forfeiture. A life policy is not a succession of contracts from year to year, but a single indivisible contract, extending from the date of its issue till the death of the assured. If each annual payment inaugurated a new contract, then the insurers might, at pleasure, decline to accept it, or fix a higher rate, or impose more onerous terms. But such is not the case. The assurers must accept the premium if tendered, and upon payment thereof the terms of the original contract continue as before. All that the assurers reserve is a chance of forfeiture, if the premium should not be paid, like the chance reserved by a mortgagee to call in the principal upon thirty days' default in payment of interest. These conditions of forfeiture do not break the continuity of either contract, or convert it from one into several contracts.

V. The referee has erred upon principle, in holding that war renders illegal the further performance of preëxistent contracts, in the same manner that it renders illegal the making of new contracts. 1. The distinction between the acquisition of rights under new contracts, and the preservation of those rights under old ones, is too well established to be questioned. And it may be doubted whether even the making of a new contract would be unlawful, provided it involved no intercourse across the lines, contravened no belligerent right, and did not, in the technical sense, lend aid or comfort to the enemy. But however this might be in relation to a new contract, it is established that performance may be completed upon preëxistent contracts, provided it infringes none of these three rules. (*Buchanan v. Curry*, 19 John. 137.) The payment

Sands v. New York Life Insurance Company.

in question did not infringe any of them. 2. The referee erred in considering this policy as an executory contract. It was partly executed and partly executory, and such contracts are never treated in law as executory contracts. Why should the one premium which remained to be paid when the war broke out prevail to give it an executory character over the eleven premiums which had then been paid, to give it an executed character. 3. The referee was led astray by mere dicta, contained in two cases of inferior authority. (*Leathers v. Com. Ins. Co.*, 2 *Bush*. 297. *Mitchell v. Merc. Life Ins. Co.*, not reported.)

VI. The breaking out of the war did not revoke Muldon's agency. The defendants did not revoke it until May, 1862; and they recognized it as continuing to exist after the proclamation of August 16, 1862. 1. Their letter to him, dated August 21, 1861, recognized and provided for the continuance of his agency. 2. Their circular letter of May, 1862, four months after this premium was paid, is the first pretense of an attempt to revoke that agency. 3. Whatever war may do as to other civil relations between citizens of contending States, it does not destroy that of principal and agent. The right to have an agent in the enemy's country is distinctly recognized, even in cases which declare other relations to be broken up. (*Griswold v. Waddington*, 16 *John*. 438. *Buchanan v. Curry*, 19 *id.* 137. *Denniston v. Embrie*, 3 *Wash. C. C.* 396. *Conn. v. Penn.*, 1 *Peters, C. C.* 496. *Ward v. Smith*, 7 *Wallace*, 452. *U. S. v. Grossmayer*, 8 *id.* 75. *Robinson v. Inter. Life Ass. Soc.*, 42 *N. Y.* 62.) *Griswold v. Waddington* contains the most exhaustive examination of the effects of war upon the mutual relations of enemies that can be found, and that case was decided upon two points only, viz: (a.) That inasmuch as all intercourse or communication with an enemy was unlawful—no matter how circuitous a course through neutrals it might take—the court would not sustain a contract based upon remittances

Sands v. New York Life Insurance Company.

during the war. (b.) That inasmuch as mutual intercourse and co-operation and effort, which are presumably essential objects in the formation of copartnerships, become unlawful in war, therefore war determines such copartnerships, not because the relation is unlawful, but because the accomplishment of their essential purpose is thenceforth rendered impossible. Neither of these grounds would apply to the case of an agency, since its object is to dispense with, instead of to promote, intercourse between the enemy principal and those dealing with him; and since the object of the relation, instead of being defeated, becomes more than ever necessary, by reason of the interdiction of direct intercourse with the principal.

4. Before it can be held that war, *ipso facto*, destroys an agency, the decisions and dicta of the following cases must be distinctly overruled: (*Buchanan v. Curry*, 19 *John*. 137. *Denniston v. Imbrie*, 3 *Wash. C. C.* 396. *Conn. v. Penn*, 1 *Peters C. C.* 496.) See also *Ward v. Smith*, (7 *Wallace*, 452, 453;) *U. S. v. Gossmayer*, (8 *id.* 75;) *Robinson v. Inter. Life Ass. Soc.*, (42 *N. Y.* 62.) In the latter case, it is said, "it is far from certain that, if the residence of the defendant had been in the city of New York, the existence of war would have vacated or suspended the authority of Carvardin. A power of attorney to collect a debt, or to receive money, (in that case, insurance premiums,) seems to continue valid, although the principal resides in an enemy's country." If money may be paid to an agent during war, to prevent the accruing of interest, why not, also, to prevent the forfeiture of a mortgage debt, or of an insurance policy? If an agent may retain his powers for one of those purposes, why not for the other?

Henry E. Knox, for the respondents.

I. From the time that, by virtue of the act of congress and proclamation of the President of the United States

Sands v. New York Life Insurance Company.

above mentioned, a state of war existed between the United States and the rebellious States, James Sands and the defendants became, and were, for all legal intents and purposes, public enemies, and all commercial or pacific intercourse or dealing between them became unlawful. The domicile of the assured, in the territory of the Confederate States, made him, in the eye of the law, an enemy of all the people in the adhering States. This principle is well founded and elementary, and has been repeatedly laid down in adjudicated cases. See the case of *The Rapid*, (8 Cranch, 155;) *Wheat. Law of Nations*, p. 548; *Mrs. Alexander's Cotton*, (2 Wal. 419.) See also 1 *Gallison's Rep.* 295, where Judge Story declared that, "war put every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other; that the subjects were in all respects considered as enemies." These general doctrines have been declared by the Supreme Court of the United States to be applicable to the recent civil war, and in pursuance of said application of them the courts have held all intercourse and all transactions between the citizens of the United States and the citizens of the so called Confederate States, since the date of the President's proclamation, illegal and void. (See *prize cases*, 2 *Black*, 673.) The Court of Appeals of Virginia, in the case of *Billgery v. Branch*, (8 *Am. Law Reg.* 334,) says: "These decisions of the supreme court settle beyond question that the late conflict between the United States and the Confederate States was a war in the legal sense, with all the incidents and consequences of a war, as they are known to the international law; that accordingly all the citizens on the one side were enemies of all citizens on the other; that all commercial and other pacific intercourse or communication between them, unless specially authorized, was unlawful, to the same extent, and for the same reason, as a war *inter gentes*; and that in order to determine how the

Sands v. New York Life Insurance Company.

contracts of individual citizens were affected by the said war, recourse must be had to the general principles applicable to a state of war as they are found in the international code." It is unnecessary to multiply citations to support a proposition so abundantly supported by the highest authority. It is only necessary to know where the residence of a person may be, to decide the question whether or not he is to be deemed an enemy in time of war. If such residence be in the territory of the hostile power, that person becomes a public enemy with whom all intercourse, commercial or otherwise, is unlawful. For further authorities, see *In re William Bageley*, (5 Wallace, 377;) *Hanger v. Abbott*, (6 id. 535;) *Robinson v. National Ins. Co.*, (42 N. Y. 54;) *Swinerton v. The Columbian Ins. Co.*, (37 id. 178.)

II. In consequence of such state of war, any insurance on the life or property of the enemy became not only illegal and void, but repugnant to every principle of public policy. After the date of the President's proclamation the assured became a public enemy upon whose life it was unlawful to make or to continue insurance. (See 1 *Duer on Ins.*, 473; 1 *Phil. on Ins.*, § 223; *Furtado v. Rodgers*, 3 Bos. & Pul. 191; *Gamba v. Le Mesurier*, 4 East, 407; *Brandon v. Curling*, id. 410; *Odelin v. The Penn. Ins. Co.*, 2 Wash. C. C. 321; *Gray v. Lewis*, 3 id. 280.) In *Griswold v. Waddington*, (15 John. 57,) and same case in the court of errors, (16 id. 438,) it is held "that as soon as war is commenced all trading, negotiation, communication or intercourse between the citizens of this country and the enemy, without the direct permission of the government, is unlawful. That if after the war has ceased an action is brought against a citizen here upon any contract arising out of such illicit intercourse, the defendant may set up the illegality of the transaction as a defense." The Kentucky court of appeals have decided to the same effect in a case growing out of a policy of insurance annulled by

Sands v. New York Life Insurance Company.

the rebellion. (See *Leathers v. The Com. Ins. Co.*, 2 *Bush*, 298.) In the cases already cited from 5 *Wallace*, 377, and 6 *id.* 535, it is declared that executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of congress. It being clear from such an overwhelming weight of authorities that the insurance of an enemy's property is illegal, it is submitted that the same principle is *a fortiori* applicable to cases of life insurance. It is admitted in the argument for the plaintiff that such an insurance could not be legally effected during the war. It is submitted that this concession yields the whole ground. The acceptance of a renewal premium is practically a new insurance, and makes virtually a new contract. The obligation of the insurer ceases with the period for which the premium is paid, and it is by the payment of a new premium only that a new insurable term is created. In the language of the Kentucky court of appeals, "it is a contract of continuing performance, one executory in its nature and requiring an act of commercial intercourse with a public enemy illegal and contrary to every principle of public policy." As a matter of principle there can be no distinction between fire and marine risks for the benefit of an enemy, and risks upon his life, so far as the question under consideration is concerned. It is difficult to imagine any manner in which more effective aid, comfort and strength could be rendered to an enemy than by maintaining in full force and effect, policies upon the lives of its citizens. It is admitted that the adjudicated cases in which the principles heretofore referred to have been applied to life insurance are but few in number, which is easily accounted for by the fact that life insurance is a matter of comparatively recent origin and developement, and that our own

Sands v. New York Life Insurance Company.

civil war furnished, perhaps for the first time, a class of cases in which the application could be made; but it is undeniable that all the arguments above cited in reference to fire and marine insurance are applicable here, if possible with even greater strength. There is, however, sufficient direct authority on the point in question, to render unnecessary any extended discussion of it. *Bunyan on Life Insurance*, (pages 19 and 308,) says: "The life of an alien enemy cannot, however, be insured even for the benefit of a creditor or British subject." (*Flindt v. Waters*, 15 *East*, 260. *Harman v Kingston*, 3 *Camp*. 153. *Potts v. Bell*, 8 *T. R.* 548.)

III. The war operated, therefore, *per se*, as a revocation of the authority to the defendants' agent in Mobile, and without any act of the parties themselves, dissolved the relation previously existing between him and the defendants, and consequently his receipt of Confederate currency as the premium, or any act of his in reference thereto, was not available to, in any manner, bind or affect the defendants. Mr. Muldon, the agent through whom the insurance was effected, continued to reside in Mobile, within the lines of the Confederate States, during the whole continuance of the war, and therefore became, as well as did the assured, an enemy of the defendants, after the war had commenced. The case is analogous to that of a commercial partnership, where the partners are citizens of different countries which have become engaged in war. The doctrine is conclusively settled, that the war absolutely dissolves such partnership, without any act of the partners, and whether they so desire or not. In the case of *Hanger v. Abbot*, (6 *Wallace*, 535,) the Supreme Court of the United States say: "Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by the operation of law between the partners, as to their respective rights, duties and obligations,

Sands v. New York Life Insurance Company.

both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties." (*Story on Part.* § 313. 5 *Wallace*, 406. 2 *Brush*, 298.)

It is a well settled doctrine in England, that a British subject or company cannot insure the life of an alien enemy, even though the latter be his debtor. (*Bunyan on Life Ins.* 19, *Law Lib.* vol. 49.) It is as clear as any legal principle can possibly be, from the above considerations and decisions, that at no time during the war could the New York Life Insurance Company have insured the life of an enemy, that is, any resident whatever of the rebellious States. How then could it do by an agent what it could not do in and of itself? *Qui facit per alium, facit per se.* The payment by our enemy to our enemy, in the enemy's country, of a premium which gives a new term to an insurance on a life of an enemy, is a transaction that cannot be sustained even in the remotest degree by any adjudication that can be found in the reports. The payment of each annual premium creates a new contract, and thereby continues the insurance. It is clear that no right was, or could have been, acquired as against the New York Life Insurance Company, by reason of any receipt of premium on the part of Mr. Muldon, after the breaking out of the rebellion. His authority as agent was at that time wholly at an end, and any attempt on his part to act under it was entirely nugatory and futile.

IV. By the terms of the policy in question, the payment on the 18th day of January of every year during its existence, by the assured to the defendants, of the annual premium of \$160, is a condition precedent to any obligation on the part of the defendants. The contract of insurance does not go into effect, in the first instance, until the payment of the first premium, and is continued in force only in consideration of the regular payment of such premium according to the terms specified. If, for any reason, such premiums are not paid on the day specified, the policy, by

Sands v. New York Life Insurance Company.

its terms, is to "cease and become null and void." Whatever cause the assured may allege as a reason for the non-payment of the premium at the specified date, he still is not excused, according to the general principle, that a person who has contracted to do a particular thing, is not excused from its performance by accident, or even by "unavoidable necessity, because he might have provided against the necessity, by his contract." (*Oakley v. Morton*, 11 N. Y. 25. *Catlin v. Tobias*, 26 id. 217. *Harmony v. Bingham*, 12 id. 99. *Tompkins v. Dudley*, 25 id. 272.) A condition precedent (which is one that must take place before an estate can vest) must be strictly performed, to entitle a party to recover, and will be strictly construed. (*Holdipp v. Otway*, 2 Saund. 106. *Wood v. Nasby*, 6 T. R. 710. *Oldman v. Bewick*, 2 H. Black. 577, n. *Routledge v. Burrell*, Id. 254. See also *French v. Campbell*, Id. 161.) In repeated decisions the payment of the premium provided for by a policy has been held to be one of those conditions precedent which must be strictly performed, and that as regards a failure in respect to it, the courts will not, and can not, interfere. In *Phillips v. Eastwood*, (*Lloyd & Gould*, 291,) Lord Chancellor Sugden said: "The money stipulated by the policy is not to be paid unless a certain person die, and unless certain annual payments are made, and other conditions are complied with." This rule is laid down in the following cases: *Mutual Benefit Life Insurance Company v. Ruse*, (1 Bigelow, 83;) *Howell v. The Knickerbocker Life Ins. Co.* (3 Rob. 232;) *Robert v. The New England Mu. Life Ins. Co.* (1 Bigelow, 634.) In *Howell v. The Knickerbocker Life Ins. Co.* (*supra*), the superior court of New York says: "It is therefore clear that the payment of the premium, on or before the 15th of July, was a condition precedent to the renewal or continuing of the policy, and before a recovery can be had on this policy, the parties seeking such relief are bound to prove all the conditions contained therein, and especially the condition

Sands v. New York Life Insurance Company.

requiring the payment of the premium on the 15th day of July, the day on which it became due, or at least the payment of the same before the death of Mr. Howell." (See also *Catoir v. The Am. Life Ins. & Trust Co.*, 4 Vroom. 487.) A careful examination of the authorities discloses the fact that the present suit is one of the first class of cases (i. e. suits upon policies of life insurance upon the lives of residents of the rebel States, dying during the rebellion,) in which it has been attempted to maintain the validity of a policy of life insurance where the premium was not paid when due. In this class of cases, which we are considering, there was no actual impossibility on the part of the insured to make payment of the premiums in question. By coming, and remaining, within the lines of the adhering States, payments might have been made promptly and regularly. It was not the fault of the defendants that the assured chose to remain within the insurgent lines, nor should they be held responsible on account of that fact. But, apart from these considerations, it is submitted that it has been abundantly shown that even if the payment had been actually impossible the assured would not be excused for having failed to make it. He had absolutely contracted to do so, and as above shown, a person who has contracted to do a particular thing is not excused from its performance by even the most unavoidable necessity.

V. The payment of confederate notes in Mobile, by the assured, to the agent of the defendants, was not a payment of the premium due by the assured to the defendants on the 18th day of January, 1862, and did not continue the policy in force. The confederate money was worthless as payment. It was not a legal tender, even by the laws of the Confederate States. Even if his agency had not been terminated by the breaking out of the war, Mr. Muldon was not authorized to receive in payment of premiums anything else than money, so as to bind the de-

Sands v. New York Life Insurance Company.

fendants without their ratification, which in this case is not pretended. An agent's authority, however generally expressed, is never to be extended by construction to embrace acts prohibited by law. (*Clark v. Metropolitan Bank, 3 Duer, 241.*) To receive confederate currency as money, or to have any dealings or transactions in it, was illegal at the time. The general rule is well settled, that a third party, even if he has dealt with an agent in good faith, must suffer the loss, rather than the principal, where the agent has not acted within the general scope of his employment. The terms and conditions of the policy of life insurance in question expressly provided that the premium should be paid to the agent in money; that is, in coin, or some legal tender of the United States. The conditions of the policy in this regard formed a contract between the assured and the defendants. It was admitted by the plaintiff's counsel, on the argument below, that Muldon's authority only went to the receipt of money. It seems unnecessary to argue at length that he had no right to accept in lieu of money a currency which not only was of no value, but was a consideration illegal in itself, and could not possibly form a valid foundation, either for creating a new contract or continuing an old one.

GEO. G. BARNARD, J. The decision of the referee was wrong. I do not think the civil war suspended the agency. The plaintiff's husband had for years paid the premium to the defendant's agent. After the war commenced, viz., in 1862, the plaintiff's husband paid to the defendants' agent the premium. The reason why he did not pay it to the defendants themselves was because he was in the Southern States, and could not get north to pay it to them. This court has held that the agency was not suspended by the war. It would be the height of injustice to hold that the plaintiff's husband having paid, regularly, the premium from 1850 to 1862, was, by no act

Carey v. Gnant.

of his, to be deprived of the benefit of the policy. It should not be the policy of the law to increase the defenses of life insurance companies as against persons honestly insuring with them.

The judgment should be reversed ; a new trial ordered ; and the reference vacated.

CARDOZO, J., concurred in ordering a new trial.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM, at New York, June 6, 1871. *Cardozo* and *Geo. G. Barnard*, Justices.]

CAREY vs. GNANT.

The plaintiff, an attorney, agreed to prosecute an action of ejectment to a final judgment, in favor of the defendant, and to put him in possession of the property ; and the defendant agreed to pay him, for his services, \$10,000. To secure the payment of that sum, a judgment by confession was entered, within four days. An action of ejectment was commenced by the plaintiff, in the name of the defendant, but before trial the parties to that suit compromised their differences. *Held* that the plaintiff could not enforce his judgment for the full amount thereof ; the work contracted for not having been performed, in full.

But that as the judgment was at any rate security for whatever sum was due to the plaintiff, it would not be proper to set it aside. Proceedings under it were directed to be stayed, however, until the amount due to the plaintiff from the defendant should be ascertained, either by a reference, or in an action upon the agreement.

APPEAL by the plaintiff from an order made at a special term.

The plaintiff, who is an attorney and counselor of this court, obtained from the defendant, who was, at the time the judgment was obtained, his client, a judgment by confession, which was predicated upon an agreement prepared by the plaintiff, on the same day, by which the defendant

Carey v. Gnant.

agreed to pay said plaintiff \$10,000 if the plaintiff prosecuted to final judgment an action of ejectment, which he agreed to bring, and which he agreed should be successful, and that the defendant should be put in possession of the premises.

The action was commenced, and on the calendar for trial, when the same was settled between the defendant, Gnant, and Anton Hüpfel, the owner of the property described in the action of ejectment. After the settlement, the plaintiff issued execution on the judgment by confession, and the defendant moved to set aside the judgment, and obtained a stay of proceedings on the execution. The court refused to set aside the judgment, but continued the stay, and made an order of reference to ascertain and report the amount due the plaintiff, for his services rendered in said action; and for his expenses and disbursements therein, and any damage to which he might be entitled on his contract, if any, by reason of the compromise of the ejectment suit. From this order the plaintiff appealed.

The following opinion was delivered at the special term.

INGRAHAM, J. The agreement between the parties was that the defendant should give the plaintiff \$10,000 if he prosecuted a claim to lands, &c., in Westchester, recovered the same, and put the defendant in possession of the property, and to secure payment thereof, a judgment by confession was entered within four days thereafter for that sum. The parties, before trial, compromised their differences.

The plaintiff now claims to enforce the judgment for the whole amount.

I am at a loss to see on what ground the plaintiff can recover the amount of the judgment. The parties compromised their differences before the trial. For all services rendered to that time, the plaintiff is entitled to be paid,

Carey v. Gnant.

and the amount agreed upon for all the services to be rendered may form the measure of damages in proportion to the service rendered. The contract did not require the defendant to continue the litigation at all events, and even if it did, it is very doubtful whether the plaintiff could claim the whole sum, if the contract was broken. The rule in regard to executory contracts is, that either party may refuse performance, and the damages to be recovered are not to be the contract price if performed, and the damages sustained by the breach of the contract. (*Clark v. Margalia*, 1 *Denio*, 317.) It is very clear that there was nothing due when the judgment was confessed, and it is equally clear that the work contracted for had not been performed. If it should appear that the defendant could in no event recover, he would not, under the contract, be required to continue a useless litigation, and it would be equally unjust to require him to pay to the plaintiff the sum agreed upon as compensation in the event of success. In such a case the plaintiff would be entitled to receive pay for the service rendered, but not the whole amount which was to be paid if successful in the litigation. I prefer to put the decision of this motion on the general principle applicable, rather than to advert to the personal matters which have been urged on the argument of the motion. These principles to which I have adverted, are, in my judgment, amply sufficient for the decision of it.

I see no objection to the parties making this motion, viz., the defendant, Gnant, with whom the agreement was made, and Hüpfel, the owner now of the premises on which the judgment is a lien. If that judgment is to be considered as a mere security, then the owner of the land affected by it is certainly not bound to pay more thereon than the defendant himself is liable for; but whether or not, he could alone make this motion, I think there can be no doubt of the defendant's right so to do.

As the judgment, however, is at any rate security for

 Carey v. Gnant.

whatever is due to the plaintiff, it would not be proper to set it aside.

In the case of *Marsh v. Holbrook*, Court of Appeals, in the opinion of Judge JAMES, (a) it is said the plaintiff was entitled to recover the sum agreed on as compensation; but, in that case, the party in reality succeeded in his recovery, and received within \$10,000 of the whole claim.

(a) That opinion was the prevailing opinion, and is as follows:

JAMES, J. The appellants first point is that the referee erred in excluding the evidence offered by the defendants of the value of the plaintiff's services, and to render a judgment upon an issue not made by the pleadings.

By the Code all forms of pleading were abolished, except as prescribed by that act. A plain and concise statement of the facts upon which the party relies, is all that is now required. This complaint, after stating the character of the parties, the employment, its nature and the condition of the subject matter, avers the value of the services to be \$5000, and that the defendants promised and agreed to pay that sum therefor.

The complaint is not therefore strictly upon the *quantum meruit*; it is equally a count for a specific sum agreed to be paid. Therefore proof of such agreement was not inconsistent with the complaint; neither was it a variance. And when the plaintiff withdrew all claim upon the *quantum meruit*, and claimed to recover upon a special agreement for the service, the actual value of the services rendered became wholly immaterial; that question was no longer in the case, and it was not error then to reject the defendants' offer to prove value.

There was no claim on the trial that the defendants had been misled by the plaintiffs being permitted to prove a special agreement for the services claimed in the action, or, by the rejection of their offer to prove the value of such services. Therefore if there was any variance between the allegations in the pleadings and the proof, it was not material, (*Code*, § 169;) and even now, if necessary, this court might, by order, conform the pleading to the fact proved, because the claim is not substantially changed. (*Code*, § 178.)

I most fully concur with the defendant's counsel that this contract should be construed with reference to the subject and the situation. What the defendants wanted was their pay. In seeking it they had been defeated and mulcted in over \$1200 costs. They then sought the services of the plaintiff, and agreed if he would undertake their case and succeeded, he should be paid \$5000. Such is the fact as found by the referee; and his findings being conclusive, they constitute the facts upon which the rights of the parties must here be determined.

It was said in *Thompson v. Kessel*, (80 N. Y. 888,) that when the testimony before a referee is conflicting upon all the material points involved in the action,

Carey v. Gnant.

The party having succeeded, was in equity bound to pay; but where a recovery is doubtful, I think a different rule must be adopted.

The plaintiff must be stayed from taking any proceedings on the judgment, until the amount due him from the defendant has been ascertained. This may be done by a reference, or the plaintiff may bring an action to recover

and the court, at general term, has affirmed the judgment, the Court of Appeals cannot look into the testimony to determine whether the facts are found according to the weight of evidence. (*See also Bergin v. Wemple, id. 819.*) This branch of the case, therefore, stands upon the basis that the plaintiff rendered the services sued for upon a special offer of compensation made at the time of the employment. Entering upon the service was an acceptance of that offer; and the offer and its acceptance constituted a valid agreement, supported by a sufficient consideration. Since the adoption of the Code there is nothing to prevent an attorney from agreeing with his client as to the amount and terms of his compensation. In this case, the plaintiff's compensation was dependent upon success; that success was only contemplated through the prosecution of the action between the defendants and their opponent, and it is morally certain that no settlement would have been proposed but for the plaintiff's efforts and partial success in prosecuting said action.

The defendants, by their agreement with the plaintiff, were not debarred from settling and discontinuing said action; but in doing so they only terminated that litigation; they did not put an end to their contract with the plaintiff. The plaintiff having performed on his part, until stopped by the defendants, is entitled to full indemnity—is entitled to recover precisely what he would have made by performance. (*Masterton v. Mayor of Brooklyn, 7 Hill, 76, and cases cited.*) I think the rule is, where performance is arrested and prevented by the act or omission of one party, the other has the election either to treat the contract as rescinded, and recover on the *quantum meruit* the value of the services rendered, or work performed; or to sue upon the contract and recover for what has been done, at the stipulated price, and for the loss in profits or otherwise, sustained by the operation. This was the rule upon which *Jones v. Judd*, (4 N. Y. 412,) was decided; although upon that question this court was equally divided.

It is a general rule that a party injured by a breach of contract is entitled to recover, not only all his damages, but also all gains prevented, if the gains were such as would have accrued to him from the contract itself, had it been performed. (*Clark v. The Mayor, &c., 8 Barb. 288 to 291. Davis v. Talcott, 14 Barb. 611.*)

The principle of allowing profits is now well established. (*See Shepard v. Milwaukee, 15 Wis. 318. Hinckley v. Beckwith, 18 id. 81. P. W. and B. R. R.*

Carey v. Gnant.

the amount due him on the contract. Upon such recovery, the payment may be enforced by proceeding upon this judgment.

L. R. Marsh, for the appellant.

I. It is entirely competent and legal for attorney and client to agree as to the amount of compensation to be paid the former, and to make the amount dependent on the success or recovery in the particular case. (*Code*, § 303. *Rooney v. Second Av. R. R. Co.*, 18 N. Y. 368. *Ely v. Cooke*, 28 id. 365. *Marsh v. Holbrook, Ct. of Appeals*, not yet reported.)

II. Here, the defendant shows he made such an agreement. He claims it was with Van Pelt; but he made the agreement. It was explained to him, i. e., that it secured Van Pelt \$10,000 when the defendant should get his property; he was to pay nothing till then; this was its effect. It was a security on the property to be recovered. On that alone. For Gnant had no other property. He understood then, perfectly, the precise effect of the judg-

v. Howard, 18 How. 307, 344. *Hay v. Grenoble, Penn.* 9. *Sedg.* 98, 4th ed. *Fet v. Harding*, 7 Cush. 576.)

In cases where there is to be an outlay to earn the sum stipulated, if completion is prevented, such outlay, if not made, should be deducted, in order to determine the profits; but in this case there is no such consideration; here no outlay or expense was to be incurred; the sum agreed upon was the measure of profits, had the contract been performed; and its performance is pronounced when performance has been prevented by the interference of the other party, and hence the sum agreed is equally the measure of damages. (*Costigan v. Mohawk and H. R. R. Co.*, 2 Denio, 609.)

The referee, in adjusting the plaintiff's recovery, apportioned it as the amount received bore to the amount claimed. This, within the principles above stated, was as favorable as the defendants could ask. They claimed \$66,000; they agreed to give the plaintiff \$5000 if he should succeed in recovering it; the plaintiff had partially succeeded, and was diligently prosecuting the work when the defendants arrested his proceedings and accepted \$56,000. Clearly the rule of damages applied was manifestly equitable and just.

Judgment affirmed.

Carey v. Gnant.

ment. He was not deceived as to the effect of the paper. There is no pretense of that.

III. The defendant says the suit is not determined; but is still pending. Then let him wait till it is, before he makes his motion. Certainly, he cannot move to set aside the judgment on the ground that he has not recovered the property, if the action for its recovery is still pending. But he has availed himself of the benefit of the plaintiff's services; then, by his own act, he has put it out of the power of the plaintiff to perform. (*See Marsh v. Holbrook, Ct. of Appeals; Hill v. Cunningham, Texas R., see N. Y. Transcript for April 5, p. 5.*) He cannot thus cheat his lawyer. It clearly appears that the settlement between Gnant and Hüpfel was made surreptitiously, and without the knowledge and consent of Carey; and the rule is, that when a party to a contract prevents its completion by the other party, the one ready to complete is entitled to recover what he would have made by performance; in other words, he is entitled to all profits that he would have made by full completion. "The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance." (*Masterton v. Mayor &c. of Brooklyn, 7 Hill, 61, 75.*) To the same effect is *Jones v. Judd*, (4 N. Y. 412,) where the court say: "When the completion of a job is arrested by the act or omission of the party for whom the work is done, the contractor has an election to treat the contract as rescinded, and recover on a *quantum meruit* the value of his labor, or he may sue upon the agreement, and recover for the work completed at the stipulated price, and for the loss in profits or otherwise sustained by the interruption." And see *Wolfe v. Howes*, (20 N. Y. 202;) *Clark v. Gilbert*, (26 *id.* 279;) *Devlin v. Second Av. R. R.*, (44 Barb. 81;) *Costigan v. Mohawk and Hudson R. R.*, (2 Denio, 609.) In

Carey v. Gnant.

Niblo v. Binsse, (1 *Keyes*, 476, 479,) where the plaintiff's assignor was prevented, by the destruction of the building by fire, (though without any fault or act of the owner,) from performing his contract to complete it, this court says: "If any party agrees with another to do work upon his house or other building, the law implies that the employer is to have the building in existence upon which the work contracted for may be done. It is necessarily a part of the contract on the part of said employer, whether it is specified in terms or not." But the case at bar is yet stronger, for the action on which the plaintiff was to do the work was settled, discontinued and put out of existence, not by any extraneous power, but by the act of the defendant himself. And this case is even stronger than the case of *Marsh v. Holbrook*. In the latter case it appears that the amount received by the plaintiff's clients was \$56,227.12, in settlement for their claim of \$67,640.95. In the case at bar the suit is not merely settled and discontinued, but Hüpfel receives a deed from Gnant of the premises in question, thus virtually acknowledging his ownership of the premises, and rendering the suit brought by Carey, not only a partial but a complete success; for after final judgment in the ejectment suit in favor of Gnant, he could have done precisely the same thing. The amount of the consideration he received from Hüpfel was a matter that does not concern the plaintiff, Carey; it could in no way affect his rights under his contract. Gnant had the right to convey the premises for \$150,000 or for \$1. An attorney contracted with his client for a contingent fee, to depend upon the result of the suit. The client compromised without consulting his attorney. Held, that the attorney was entitled to recover the whole amount of his fee. (*Hill v. Cunningham, Texas B.*, see *N. Y. Transcript for April 5, p. 5.*)

IV. The judgment is only available as a lien on the land, the subject of that action. If Gnant owns the land,

 Carey v. Gnant.

then he can well afford to carry out his agreement, viz., pay \$10,000 for getting \$150,000. If Gnant does not own the land, then the judgment does him no harm.

V. A third party—Hüpfel—comes in, and claims to make this motion. It is enough to say he cannot proceed, by motion, in the action, to set the judgment aside. His only remedy would be by bill, to set the judgment aside, as a cloud on his title. He is not a party to the action.

VI. The amount of the compensation was not unreasonable. 1. It was fairly proportioned to the amount involved.

Ejectment for property worth	\$150,000
Mesne profits	50,000
	\$200,000

2. The plaintiff had to take all the risk. Gnant had no money or other property; was not able to advance a dollar, and he so stated. The agreement was that he was not to advance. 3. Carey was to get his pay out of the property sued for, or not at all.

VII. This is stronger than if Carey was suing to recover \$10,000, as agreed to be paid. It is a consummated consideration. It is an absolute payment. Suppose Gnant had paid him \$10,000 in cash on this agreement, declaring the indebtedness present and absolute, could he, by settling, sue for and recover it back? Yet, that is the nature of this motion.

VIII. The amount of the judgment may seem large in view of the service actually rendered. But it must be remembered that this was a contract. The service which Carey undertook to perform was most important and valuable. He took all the responsibility upon himself. Suppose he had spent years in carrying the case through all the courts, and fairly earned a much larger amount, could he recover one dollar beyond his contract price? Certainly not. The rule then must work both ways, and when Gnant has the full benefit of a successful termina-

Carey v. Gnant.

tion of the suit in this early stage, he should also be held to the contract price.

James M. Smith, for the respondent.

I. By reference to the agreement between the plaintiff and the defendant, it appears that it was an executory contract. If either party refused to perform the contract on his part, he subjected himself to an action, and the measure of damages would be the amount of loss he had sustained by reason of the violation of his agreement. (*See Clark v. Marsiglia*, 1 *Denio*, 317; *Sedg. on Damages*, 204, 209–211; *Shannon v. Comstock*, 21 *Wend.* 457.) No rule is better settled than this. In actions of contract, damages are strictly limited to the direct pecuniary loss resulting from the breach of the agreement in question.

II. The Code, in extending the rights of attorneys, in allowing them to contract with their clients, as to compensation beyond the allowance given by statute, has not changed the law as to the construction and effect of executory contracts. The Code gives no special privilege to an attorney as a contractor with his client. It simply relieves him of a disability that before existed. It suffers him to make a contract with his client as to compensation. It does not alter the law of executory and executed contracts. (*Code*, § 303.) Previous to the Code, the law was stringent as to dealing between attorney and client. The reason for that supervision by the courts still exists. The Code has in no respect changed it, as to the reasons for the rule. It simply permits an attorney to make a binding contract with his client for his services, but gives him no advantage over other contractors. (*Story's Eq. Juris.* §§ 311, 312a, 312b, 312c and 312d.)

III. "In actions of contract, damages are strictly limited to the direct pecuniary loss resulting from the breach of the agreement in question." (*Sedg. on Damages*, 204, 209.) The amount to be recovered is not the price stipulated to

Carey v. Gnant.

be paid on full performance, but the actual injury sustained in consequence of the defendant's default—compensation for actual loss. (*Sedg. on Damages*, 209–211.) In *Shannon v. Comstock*, (21 *Wend.* 457, the court say: "In an action to recover damages for the non-performance of a contract, other than for the conveyance of land, the rule of damages is the loss or injury sustained by the party ready and willing to perform, and not the price agreed to be paid on actual performance." In the case of *Miller v. Mariners' Church*, (3 *Greenl.* 51, 55, 56,) Mellen, Ch. J., says: "In general the delinquent party is holden to make good the loss occasioned by the delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure."

IV. The judgment should have been set aside, for the reason that it does not conform to the requirements of the Code. (§ 383.) By the agreement, the plaintiff was to recover for Gnant the possession of the land, &c., and put him in possession thereof. The record is inconsistent with the agreement upon which the judgment is entered. It acknowledges a "present and absolute indebtedness," and yet it specifies that such indebtedness depends upon a contingency, which contingency might never happen. It contains a false recital apparent on its face. It is not within the 2d subdivision of section 383, for the reason it does not show that the sum is "justly due or to become due." It certainly is not due, and its becoming due depends on a contingency that may never happen. It does not come under the 3d subdivision. In order to bring it within that, the record should state that it was given for a contingent liability, and not, as in this case, for a "debt justly due."

V. Even where a judgment has been confessed, the court will, after a great lapse of time, order a reference to ascertain what was justly due. (*Draper's Company v. Davis*,

Trustees of Union College &c. v. Wheeler.

2 *Atk.* 295.) In that case, Lord Hardwick, chancellor, ordered the judgment canceled; and the securities delivered up.

The order appealed from was more favorable to the plaintiff than it should have been. The appeal should be dismissed, with costs.

By the Court, GEO. G. BARNARD, J. I think the order appealed from should be affirmed. All of the points presented by the appellant have been fully covered by the justice who made the order below.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, June 6, 1871. *Cardozo* and *Geo. G. Barnard*, Justices.]

50 585
61h 24

THE TRUSTEES OF UNION COLLEGE &c. vs. WILLIAM H. WHEELER, Executor &c., and others.

An assignee of a mortgage is a purchaser, and if a *bona fide* purchaser, is not chargeable with his assignor's notice of incumbrances upon, or estates in, the mortgaged premises.

Though *possession* of land is notice to all the world of the possessor's interest, the definition of the word *possession* is restricted to an actual, open, visible occupancy, accompanied by improvement of the premises.

Fencing, pasturing, cutting and selling timber, and clearing part of the premises, do not constitute such possession.

Where, prior to January 1, 1880, the purchase money of land was paid equally by A., S. and N., but a deed of the whole was taken by A. alone, who, after that date, conveyed an undivided two-thirds to S., and the premises were subsequently, by A. and S., contracted to be sold in parcels to various parties under whom the defendants claimed, and who paid portions of the purchase money to A. and S.; and before deeds were given, N. quit-claimed to S. his interest in the premises and took back from S. a mortgage, which was subsequently assigned by N. to the plaintiff, who had no notice of the contracts, and paid value; *Held*, on foreclosure,

1. That a trust resulted to N. in one-third of the land.
2. That the trust was not divested by the conveyance to S. though subsequent

Trustees of Union College &c. v. Wheeler.

to the Revised Statutes, but remained a valid charge upon the land, in S.'s hands.

3. That S. acted as N.'s *agent*, in giving the contracts, and that N. was chargeable with notice of the contracts, as the acts of his agent; which notice was effective in the transaction of the mortgage.
4. That the mortgage, in N.'s hands, was therefore no lien upon the land, as against the contract purchasers.

Held, also, that the plaintiff, being a *bona fide* purchaser, was not chargeable with the notice N. had; and that the mortgage in the hands of the plaintiff was therefore a valid lien upon the land of those of the contract purchasers whose possession did not amount to constructive notice of their rights.

APPEAL by the plaintiff from portions of a judgment entered upon the report of a referee.

The action was brought to foreclose a mortgage. Prior to October 1, 1828, Benjamin Nott, Chauncey B. Aspinwall and Philo Stevens, purchased of James Mellen fifteen lots of land in the town of Scriba, described in the complaint, and they were equally interested in said purchase. On the 1st of October, 1828, Mellen conveyed all of said lots to Aspinwall. January 27, 1830, Aspinwall conveyed two undivided thirds of all of said lots to Philo Stevens, being the share of Nott and Stevens. Prior to the deed from Mellen, they had been selling portions of these lands, and subsequently and prior to July 18, 1833, had sold all of the fifteen lots, and more than half of the lots had been conveyed and deeds recorded; and as to the residue, Aspinwall, and Aspinwall and Stevens, had given contracts to the purchasers, and they had taken possession of the lands and commenced improving and clearing them, fencing, putting in and raising crops, erecting houses thereon, and occupying them, and had made large payments on account of the purchases, and of all of which Nott had notice, and he received from Aspinwall accounts of moneys received, and from whom, and received his third part of all of the moneys received from said sales. And the full contract prices were embraced in the accounting had between Nott, Aspinwall and Stevens, as to the proceeds

Trustees of Union College &c. v. Wheeler.

of such sales. On the 18th day of July, 1833, Nott executed a deed to Stevens, of all his interest in these fifteen lots, and also three lots in the then village (now city) of Oswego, Nott's interest in city lots being two-thirds, and worth \$4000; and on the same day Stevens executed the mortgage in question to Nott, on the whole of the village lots, and also on the whole of the Scriba lots, and of which the purchasers had no notice until this action was commenced in 1868. After the purchasers of the Scriba lands had acquired all their rights to the lands, and after notice to Nott and possession, and in 1835 and 1836, Nott released two of the village lots from the lien of the mortgage, and which were worth and sold for more than enough to pay the mortgage. This action was commenced in 1868, more than 32 years after the execution of those releases by the trustees of Union College, the pretended owner of said mortgage by assignment from Nott, and of which the owners of the Scriba lands had no notice prior to the commencement of the foreclosure. The complaint admitted the release of two of the village lots by Nott, and as to which no claim was made, and ratified the act by Nott, but claimed that the lien of the mortgage on all of the rest of the lands therein described was perfect. All of the holders of contracts, to whom deeds had not been given, at the date of the mortgage, were made parties, and most of them appeared and set up their rights in their answers.

The case was referred to a referee to hear and determine, and on the trial the plaintiff abandoned all claim to about half of the Scriba lots, and the referee made his report, by which he ordered the complaint to be dismissed, as to all of the defendants that had answered, and adjudged and decided that the mortgage was not a lien, charge or incumbrance on their lands.

Judgment having been entered on this report, the plain-

Trustees of Union College &c. v. Wheeler.

tiff appealed from the same, so far as it dismissed the complaint as to all of the defendants except Carey Mitchell.

E. W. Paige, for the appellant.

I. The referee has decided this case upon the theory that the value of the premises released by Benjamin Nott must be subtracted from the amount due upon the mortgage. But the notice, with which the mortgagee must be affected, in order to sustain this ruling, must be of dealings between the mortgagor and the vendees subsequent to the mortgage, by which rights to marshall were created; and those rights must have been defeated by releases. (*Stuyvesant v. Hall*, 2 Barb. Ch. 155. *Howard Ins. Co. v. Halsey*, 4 Seld. 273. *Taylor v. Short's Adm'r*, 27 Iowa, 361.) But there is no proof of any notice subsequent to the mortgage, and the defendant's theory below was that Nott had parted with his interest at that date. The referee must have supposed that knowledge of the contracts before the mortgage was sufficient. Again, the release must have been the act of the mortgagee, (*cases cited supra*;) but Nott had assigned the mortgage to the plaintiff prior to his releases. But for the recording act, therefore, the plaintiff would have been the mortgagee as to all the world; notwithstanding that act the plaintiff was mortgagee as to all but subsequent purchasers. The defendants, however, must have been prior purchasers, or they could not plead the releases. See as to effect of assignment, *Gillig v. Maas*, (28 N. Y. 211;) *Jones v. Gibbons*, (9 Ves. 410.) The plaintiff therefore was the mortgagee; but the release was the act of Nott. For the same reason, notice to the plaintiff of the right to marshall must be proved.

II. It appears that most of the land was held under contracts of sale given prior to the execution of the mortgage. But to postpone the lien of the mortgage, notice of the contracts to Benjamin Nott must be proved. There is no proof of actual notice, and the referee expressly finds that

Nott had none; but the attempt is made to charge him with notice in three ways: 1st. Constructive notice sufficient to "put him on inquiry." 2d. Constructive notice from his relations with Aspinwall and Stevens. 3d. Constructive notice from the possession of the owners of the contracts. The referee finds "that Nott was informed from time to time of sales of said lands being made," &c., and that was sufficient notice to put him on inquiry. "Said lands" including much more than is in dispute. This is equivalent to holding that knowledge of the sale of one piece of land binds a party to inquire as to other pieces belonging to the same owners. But the doctrine of notice to put upon inquiry has never been carried to this extent. And it is submitted with confidence that the following are two of its requisites; or at least that there is no case, either in this country or England, where notice to charge a party to inquire concerning the sale or incumbrance of land has been held sufficient, without their presence.

1. The notice which puts a party upon inquiry must be actually proved to have been given, except in the cases where a systematic and suspicious avoidance has been proved; an exception which proves the rule. But in this case there is only a probability, or a suspicion of the notice which is to put upon inquiry. The referee specially finds that there was no actual notice.
2. The notice proved must be connected with the vendee; there must be something to point him out, so that it may be known of whom the inquiry is to be made. But here there is only proof that sales were being reported; not a word as to the parties to whom the sales were made. In the case of *Jones v. Smith*, (1 *Hare*, 55,) an attempt was made by Sir James Wigram, to define this kind of constructive notice; his construction was affirmed by Lord Lyndhurst, on appeal, (1 *Phil. Ch.* 253,) and the definition itself was adopted by Chancellor Walworth in *Stuyvesant v. Hall*, (2 *Barb. Ch.* 159,) and is therefore the law of this State.

Trustees of Union College &c. v. Wheeler.

It is as follows: "First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and second, cases in which the court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry, for the very purpose of avoiding notice." It will be observed that the notice must be actual; and that the actual notice must be of charges upon the property in dispute, and concerning which the inquiry is to be made. Notice in regard to another piece of property in the same general tract, or belonging to the same owners, is not sufficient; nor is a probability or suspicion of notice in regard to the same property sufficient. And since then the English courts have expressed their determination not to carry the doctrine of this kind of constructive notice any further. (*Lord Lyndhurst in the same case of Jones v. Smith*, 1 Phil. Ch. 253. *Lord Cramworth in Ware v. Lord Egmont*, 4 De G., M. & G. 460.) But in this State the doctrine has uniformly been applied with great caution. (*Dey v. Dunham*, 2 John. Ch. 182. *Jackson v. Van Valkenburgh*, 8 Cowen, 260. *Frazer v. Western*, 1 Barb. Ch. 220. *Williamson v. Brown*, 15 N. Y. 359.) Now here was a large tract of wild land, of which not more than one fifth or sixth part is concerned in this litigation; the title of which was in Aspinwall and Stevens, and which, whatever Nott's interest may have been, and as to that there is something to be said hereafter, Aspinwall and Stevens were alone concerned in the business of selling. This tract was, by them, cut up into farms, and the business of selling those farms occupied full ten years, of which at least six or six and one-half were subsequent to the mort-

gage. Admitting that Benjamin Nott knew that sales of parts of this tract were being made, the question arises, of which sales was he cognizant? and the probabilities are in favor of the greater numbers. It is more likely that the sales which he knew of should fall during six and one-half years, than during three and one-half; and more likely still that they were upon the five-sixths than the one-sixth of the tract. Here is a double probability, of time and of position. The chances are fifteen to one that Nott did not know of the sales of the lots claimed to be subject to the mortgage. It is not fair to presume in favor of the defendants, upon whom the burden of proof lies; but without presumption there is no notice proved. The gist of the doctrine of notice to put upon inquiry is fraud; (*Williamson v. Brown*, 15 N. Y. 364, 365; *Wyatt v. Barwell*, 19 Ves. 436;) "but you never can presume a fact in order to impute fraud to a party." (*Pearson v. Morgan*, 2 Bro. C. C. 388.) The whole evidence amounts to no more than what the books call "suspicion of notice," which is never sufficient to charge a purchaser's conscience. It appears that Nott paid one-third of the purchase money of this land, and the deed was given to another person, viz., Aspinwall, December, 1829. This, being before the Revised Statutes, would have worked a resulting trust to Nott, if there were any proof that the money was paid at the time the deed was given. But there being no such proof there was no trust. (4 *Kent's Com.* 317, 7th ed.) Even if there had been a trust, Aspinwall's deed to Stevens, January 26, 1830, being since the Revised Statutes, divested Nott of his interest, according to the referee's finding. We claim, then, that Nott had no interest at all. And there is not a particle of proof that he ever exercised a single act of ownership over the tract in question, or received any money from the sale of it. 1. But granting that he had a trust, the doctrine is clear that notice to a trustee is not notice to his *cestui que trust*. Because

Trustees of Union College &c. v. Wheeler.

(1st.) There is no reported case which even hints at such a doctrine, nor does any text book state it. (2d.) It is directly opposed to the rule, that no act of a trustee shall prejudice his *cestui que trust*, a rule which has but one exception, viz., a conveyance by a trustee to a purchaser without notice of the trust. (3d.) The theory upon which notice to an agent or attorney is held to be notice to his principal, i. e., the theory of control, breaks down in the case of a trust. (4th.) In the case of constructive trusts, such cases as 3 *Kernan*, 180, and 4 *Keyes*, 509, negative the doctrine; they hold a judgment to be a lien upon unpaid purchase money after express notice given. If notice to a trustee affected his *cestui que trust*, the rendition of the judgment would be notice, because the trustee must necessarily know of it. (5th.) The cases of *The National Bank v. Norton*, (1 *Hill*, 572;) *In re European Bank, Law Rep.* (5 *Ch.* 362,) are direct authorities against it. 2. There is but one relation through which a person is held to be affected by the notice of another, and that is the relation of a person to his agent, attorney or solicitor. But there is no such relation here; for, (1st.) There is not a particle of proof of authority from Nott to support a theory of agency. (2d.) The relation of trustee and *cestui que trust* is destructive of any other; because the law gives to the trustee every power which he could exercise as agent, and untrammelled by the authority which a principal could exert over him. (3d.) But even if there were an agency proved, both to Stevens and to Aspinwall, or if it were held that notice to a trustee could affect his *cestui que trust*, it would still be unavailing, because, first, the agency meant is an agency in the transaction of getting the mortgage, (*Bank of U. S. v. Davis*, 2 *Hill*, 461;) and second, the notice to the agents must be in the transaction of getting the mortgage. (*Howard Ins. Co. v. Halsey*, 4 *Seld.* 274. *Ashley v. Baillie*, 2 *Ves. Sr.* 370. *Fitzgerald v. Fauconberge*, *Fitzg.* 210. *Warrick v. Warrick*, 3 *Atk.* 294.

 Trustees of Union College &c. v. Wheeler.

1 *Story's Eq. Jr.* § 408.) Even if Nott had notice to put him on inquiry, or if it could be held that the knowledge of Stevens and Aspinwall affected him with notice of the contracts at the times when they were given, it would be insufficient to postpone the lien of mortgage; because he will not be "bound by notice in a previous transaction which he may have forgotten." (2 *Sugd. on V. and P.* 1040.) The notice must be acquired in the same transaction. (*East Greenstead's case*, *Duke*, 64, per *Ld. Cowper*. *Hamilton v. Royse*, 2 *Sch. & Lef.* 315, per *Ld. Redesdale*.) These defendants are therefore driven to their possession to prove notice to Nott. The general doctrine, that possession is notice to all the world of the possessor's rights, is not denied; but it is claimed that the possession proved in this case is insufficient. The rules by which it is to be tested are as follows: 1. The possession must be actual, open, visible and exclusive; not a mere constructive possession. (*Webster v. Van Steenberg*, 46 *Barb.* 215. *Tuttle v. Jackson*, 6 *Wend.* 226. *Troup v. Hurlbut*, 10 *Barb.* 358.) 2. It must at least be of a character to amount to a disseisin; acts of trespass are not sufficient. (*McMechan v. Griffing*, 3 *Pick.* 155, 156. *Cook v. Travis*, 22 *Barb.* 338, and 20 *N. Y.* 400.) 3. It must be continued to the time when the title of the party sought to be charged with notice accrued. (*Miles v. Langley*, 1 *Russ. & M.* 40. 2 *id.* 626, per *Ld. Brougham*. *Stevens v. Wiswall*, 8 *Greenl.* 94.) 4. Possession begins to be notice only from the time the legal title is conveyed in violation of the trust. (*Scott v. Gallagher*, 14 *Serg. & R.* 333. And see *Fassett v. Smith*, 23 *N. Y.* 258, 260.) 5. Cutting trees, being but an act of trespass, is not notice. (*McMechan v. Griffing*, 3 *Pick.* 155.) 6. Making or repairing fence is not notice. (*McMechan v. Griffing*, 3 *Pick.* 155. *Merritt v. N. R. R. Co.*, 12 *Barb.* 608.) 7. Entry on fifty acres of uncultivated land, clearing fifteen acres and working them, building house and still-house, and living upon, and using the

 Trustees of Union College &c. v. Wheeler.

premises twenty years, is not notice, where the boundaries of the fifty acres are not settled. (*Billington v. Welsh*, 5 *Binney*, 129.) 8. Possession being evidence of the possessor's title only, the possession of a tenant is not notice of his landlord's title. (*Barnhart v. Greenshields*, 28 *Eng. L. and Eq.* 82. *Flagg v. Mann*, 2 *Sumner*, 557. *Cook v. Travis*, 20 *N. Y.* 402. *Hanbury v. Litchfield*, 2 *M. & K.* 629.)

III. To enforce these contracts against the mortgage, notice must be proved to the plaintiff. Notice to Nott alone is insufficient. 1. The principle is elementary, that if a *bona fide* purchaser buy from one who is affected with notice, he will be protected in his title against a trust estate. The plaintiff purchased for value, and without notice. Is it then a purchaser? That it is a purchaser within the definition of the recording act has been finally settled by the case of *Belden v. Meeker*, (2 *Lans.* 475;) and if the defendants had held unrecorded conveyances, the case of *Fort v. Burch*, (5 *Denio*, 187,) where this precise point was decided, would be conclusive in favor of the plaintiff. As it is, these authorities are binding in the two cases where the contracts were executed. But the difficulty is that executory contracts of sale are excepted from the recording act, (§ 38,) and it is therefore necessary to prove the plaintiff a purchaser, within the meaning of the statute of frauds. That a mortgagee is a purchaser within the meaning of that statute, is unquestionable. That the assignee of a mortgage is a purchaser was decided in the cases of *Martin v. Jolliffe*, (*Ambler*, 313,) and *Sweet v. Southcote*, (2 *Brown's C. C.* 66.) And in *Matthews v. Wallwyn*, (4 *Vesey*, 125,) Lord Rosslyn said, "the mortgagee may convey the estate, the land vested in him, without the privity of the mortgagor." And in *Phillips v. Bank of Lewiston*, (18 *Penn.* 394,) quoted in 1 *Washburn*, 520, the court say: "A mortgage is in form a conveyance of the land, and an assignment of it is another conveyance of the same land." In *Graydon v. Church*, (7 *Mich.* 58-62,)

Trustees of Union College &c. v. Wheeler.

Christiancy, J., reviewing all the New York authorities, comes to the same conclusion; and in *Pierce v. Faunce*, (47 Maine, 514,) Appleton, J., says: "A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with the *bona fide* mortgagee." But if this be true, the point is proved. The ambiguity of the question comes from such *dicta* as that "the assignee of a mortgage takes it subject to all the equities which could have been enforced against his assignor," and "that a mortgagee can assign no other rights than he possesses himself," which are scattered quite plentifully through the books. But there are no decisions which go that length. All cases which decide that an assignee takes subject to equities, belong to one of two classes—where equities were between parties to the chain of title, such as *Bush v. Lathrop*, (22 N. Y. 535;) or where the equities were between a party to the chain of title and a person who had acquired the equity of redemption, such as *Hartley v. Tatham*, (1 Keyes, 222.) But there is no case which holds that an equity between a third party and the mortgagor, which has nothing to do with the debt, and has taken precedence of the mortgagee's interest in the land, solely by means of personal notice to him, shall bind an innocent assignee. The purchaser of a bond and mortgage buys two things; a chose in action, and an interest in real estate; and there is no necessity of altering the character which either security bears in the eyes of the law. An assignee of a bond, he takes the bond subject to an equity which could in any action at law have been set off against it in his assignor's hands. But as a purchaser of real estate he takes his interest in the land; that is, his right to get from the land whatever has been found due upon the bond, unaffected by notice to his assignor, and free from all secret trusts,

Trustees of Union College &c. v. Wheeler.

equitable estates or unrecorded conveyances of which he is ignorant.

To prove this construction, it is only necessary to examine the manner in which the doctrine that an assignee takes subject to equities was originated. The point first came up in England, in 1798, in the case of *Matthews v. Walhyn*, (4 *Vesey*, 128,) and Lord Rosslyn said: "It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a security for a debt; and the real transaction is an assignment of a debt from A. to B.; that debt collaterally secured by a charge upon real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law, in any mode he could take to recover what was due upon the assignment." The first case in this State was *Clute v. Robison*, (2 *John*. 612,) decided in February, 1807, where Ch. J. Kent, delivering the opinion of the court of errors, says: "There is no rule of equity better settled, than that a bond, or other chose in action, is liable to the same equity in the hands of the assignee, that existed against it in the hands of the obligee. (2 *Vern*. 692, 765. 1 *Vesey*, 122.) The registry act concerning mortgages has nothing to do with this case. The respondent does not stand here in the character of a *bona fide* purchaser of lands, but as assignee of a bond. He took the bond as payment or security for a debt, and the mortgage by which that bond was secured, followed it as an incident." These cases—the earliest reported—show that the doctrine was originated by applying to a mortgage debt the ancient rules in regard to choses in

action; and the conclusion is fair, that those rules are to be applied, so far as the debt is concerned, only to the chose in action. There is a class of later cases which confirm this view; cases where a mortgage is given as collateral to a negotiable note, instead of a non-negotiable bond; in which it is held that if the note be transferred before maturity to a *bona fide* holder, he will take it free from all equities; plainly showing that there is nothing in the mortgage which subjects the assignee to the obligation of his assignor, but that character, belonging only to the instrument which is the evidence of the debt, must be restricted to such equities as could be set off against the debt. Such cases are *Fisher & Robinson v. Otis*, (3 *Chand.* 83;) *Reeves v. Scully*, (*Walker's Ch.* 248;) *Martineau v. McCollum*, (4 *Chand.* 154;) *Croft v. Bunster*, (9 *Wis.* 510;) *Taylor v. Page*, (6 *Allen*, 86;) *Howard v. Gresham*, (27 *Ga.* 349.) The conclusion is that an assignee takes subject to the equities which could have been enforced against his assignor if there had been no mortgage, but only a bond, i. e., the amount and validity of the debt. And as far as the power of enforcing his lien upon the land is concerned, he is entitled to all the rights, and subject to all the liabilities of a purchaser of real estate. And the decisions bear out this construction. (See *Jackson v. Van Valkenburgh*, 8 *Cowen*, 260; *Bloomer v. Henderson*, 8 *Mich.* 402; *Moore's Appeal*, 7 *W. & S.* 298; *Mott v. Clarke*, 9 *Barb.* 404; *Pryor v. Wood*, 31 *Penn.* 147; *Glidden v. Hunt*, 24 *Pick.* 225. *Pierce v. Faunce*, 47 *Maine*, 514; *Richardson v. Brackett*, 101 *Mass.* 500.)

The case of *Jackson v. Van Valkenburgh* decided that the *bona fide* assignee of a mortgagee, who had notice of a prior unregistered mortgage, was not affected by his assignor's notice. As this case was decided in 1828, before the Revised Statutes took effect, it is a direct authority.

2. But admitting, for the argument, that the rule in regard to choses in action has been extended to the mort-

Trustees of Union College &c. v. Wheeler.

gage, as well as the bond; or, in other words, that the interest in real estate has been converted into personal property; this point can still be upheld upon the doctrine of "latent equities," originated by Chancellor Kent in the case of *Beebe v. The Bank of New York*, (1 John. 573.) That doctrine received a most exhaustive examination in the case of *Bush v. Lathrop*, (22 N. Y. 538,) when Justice Denio, after disapproving the doctrine in most cases, says that "a distinction, of the nature suggested by Chancellor Kent, no doubt exists between the rights of the debtor in this class of cases, and those of third persons who have dealt with the original creditor or his assignee," (*Id.* 548,) and comes to the conclusion that an assignee is not prejudiced by notice of his assignor. (*Id.* 549.) See also *James v. Morey*, (2 Cowen, 298,) where the language of Sutherland, J., at foot of page 298, is precise as to this question of notice. And see also *Borough v. Moss*, (10 B. & C. 558;) *Croft v. Bunster*, (9 Wis. 508;) *Cicotte v. Gagnier and wife*, (2 Mich. 389;) *Bloomer v. Henderson*, (8 id. 402.) To the contrary, as to the assignment of a judgment, *Downer v. South Royalton Bank*, (39 Verm. 25.) It follows that, to establish their defenses, these defendants must prove notice in the plaintiff; and as there is no pretense of actual notice, and the referee specially finds that there is none, it can be done only by showing such possession as will amount to notice, down to July 1, 1834, the date of the assignment. But the evidence shows that there was no such possession. The records of the defendant's deeds, in the cases where deeds were given before the date of the assignment, are not notice to the plaintiff, as would seem from *Mickles v. Townsend*, (18 N. Y. 580, 581,) because they are junior to the mortgage upon their faces, and if the plaintiff had read them all, no clue could have been gathered of a title superior to Benjamin Nott's. Neither does the neglect of the plaintiff to record its assignment invalidate the lien, under the rule of 15 Wend. 588; 17 id. 25, and 3 Keyes, 450; be-

cause nearly all these contracts of sale were not conveyances, within the meaning of the recording act, and the deeds do not relate back; and the two contracts which were executed, were never recorded.

IV. Admitting, for the sake of the argument, that the contracts take precedence of the mortgage, the plaintiff has still a lien upon the land, to the extent of the unpaid purchase money, from the date of the record of the mortgage, August 8, 1833. There have been three decisions adverse to this doctrine: In *Parks v. Jackson*, (11 *Wend.* 442,) the court of errors decided that the filing of a *lis pendens* was not notice, to a vendee in possession under a contract, of the pendency of the suit; the chancellor basing his opinion upon the imperfection of a general lien; Senator Seward, upon the argument, from inconvenience. In *Moyer v. Hinman*, (17 *Barb.* 137, and 3 *Kern.* 180,) the Supreme Court, per Allen, J., decided that a judgment was a lien, to the extent of the unpaid purchase money; but the Court of Appeals reversed the judgment, requiring express notice to the vendee under the contract; Justice Denio basing his opinion upon the argument from inconvenience; Hand, J., upon the imperfection of a general lien. So far there is nothing to negative the doctrine in the case of a mortgage, since the opinions specially distinguish a general from a particular lien. But the case of *Smith v. Gage*, (41 *Barb.* 90,) seems to decide that a judgment is not a lien upon the vendor's interest, under any circumstances; that the doctrine of equitable conversion has changed the vendor's interest entirely into personal property, which a judgment cannot bind. If that doctrine be sound, of course neither a mortgage nor a deed of the land by the vendor will pass any interest, because he has no right left *ad rem*—nothing but the personal obligation of the vendee. The case is opposed to the point contended for, only as holding that the vendor has no legal interest, upon which a lien can attach. But it is submitted that

Trustees of Union College &c. v. Wheeler.

the decision is unsound; and that it is unnecessary to quote authority against it. It is to be noticed, however, that in that case the contract had been severed from the trust to convey, and the decision may be put on that ground. To the contrary of these decisions is *Lefferson v. Dallas*, decided by the Supreme Court of Ohio, January, 1871, (3 *Albany Law Journal*, 118.) It will be observed, then, that although it is decided that a judgment is not a lien upon the unpaid purchase money, without express notice, there is no hint of the same doctrine in the case of a mortgage. Now, there is a great deal of difference between a mortgage and a judgment, which is all in favor of the mortgage; and to find an equitable title controlling the one, while it is controlled by the other, is rendered familiar by the analogies of the law. For instance, a contract of sale will control a judgment without notice to the judgment creditor, *secus* a mortgage, (*Matter of Howe*, 1 *Paige*, 128;) and a mortgage will bind the equity of redemption, though a judgment would not, at common law; and a mortgage, though unregistered, is preferred to a docketed judgment. (1 *Edw. Ch.* 653. 8 *Wend.* 620. 4 *John.* 216.) The substantial difference is, that a mortgagee is a purchaser; but "one cannot call a judgment creditor a purchaser, nor has such creditor any right to the lands; he has neither *jus in re* nor *ad rem*, and therefore, though he releases his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but *non constat* whether he will ever make use thereof; for he may recover the debt out of the goods of the cognizor by *feri facias*, or he may take the body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment; nor is he deceived nor defrauded, though the cognizor of the judgment had be-

Trustees of Union College &c. v. Wheeler.

fore made twenty mortgages of all his real estate, whereas a mortgagee is defrauded or deceived if the mortgagor, before that time, had mortgaged his land to another." (*Brace v. Duchess of Marlborough*, 2 *Peere Williams*, 491.) If, then, there be any authority for the principal doctrine, there is no reason why any of these quoted decisions should be held to negative it. The authorities are two: *Ten Eick v. Simpson*, (1 *Sand Ch.* 244;) *Gouverneur v. Lynch*, (2 *Paige*, 300.) The first is but a dictum, because express notice was proved in the case. The second is an exact decision, precisely in point. The chancellor says: "If the purchase money has been paid before notice of, and prior to, the recording of a subsequent mortgage, the mortgagee will have no claim upon the land; where a part remains unpaid, he will have an equitable lien thereon, to the extent of the unpaid purchase money." It is clear from this, that whether the mortgage has been recorded, or notice has been given, in either case the unpaid purchase money is bound. The chancellor continues: "If the lands not contracted for at the date of the mortgage are insufficient to pay the amount due the complainant, with costs, the master must ascertain and report the amount of the purchase money which was due on the other lots, at the time of the registry of the mortgage. No notice to the vendee was proved in the case." The chancellor's opinion was reiterated in the subsequent case of *Farmers' Loan and Trust Co. v. Maltby*, (8 *Paige*, 362.) He there stops to inquire whether the plaintiff had a legal mortgage or an equitable lien, holding that the first would bind the purchase money from its registry, the second only from the giving of actual notice. It is not a decision, because the plaintiffs proved to have but an equitable lien. This decision is not to be put upon the ground that the registry is notice, for Chancellor Walworth himself many times decided that it was notice only to subsequent purchasers, but upon the power of a particular lien to control a partic-

Trustees of Union College &c. v. Wheeler.

ular equity, while a general lien would be controlled. It is a rule of the common law, or, more properly, of equity, and has nothing to do with the recording act. A statement of Sir Francis Vernon, *arguendo*, in the case of *Finch v. Earl of Winchelsea*, (1 Peere Wms. 278, 279,) the same case from which Chancellor Walworth deduced the doctrine of *Matter of Howe*, famous as a leading case, seems to have been the origin of the doctrine. The chancellor's authorities, to judge from his opinion in *Parks v. Jackson*, already quoted, were 1 *Atk. on Convey.* 512; *Hampson v. Edelin*, (2 *Har. & John.* 64,) and *Fasholt v. Reed*, (16 *Serg. & R.* 267.) The reason for dating the lien from the registry was, perhaps, that since the recording act an unrecorded mortgage could not be considered as completely valid; it might be avoided by a subsequent conveyance. The only objection which can be urged to the doctrine is, that the inconvenience argument, upon which the opinions of Senator Seward and Justice Denio, already referred to, were based, is as destructive of the lien of a mortgage as of a judgment. But that is a reason of policy, and not law. There being no law to the contrary, it was perfectly proper in those cases to use such an argument to bolster up what law there was in its favor, but such an argument can never be used to overthrow established decisions. (See *Justice Denio's own words to this effect in Bush v. Lathrop*; 22 *N. Y.* 549.) But the case of *Gouverneur v. Lynch* has never been overruled, or even doubted. The point has the chancellor's unimpeached authority, and it is controlling upon this court.

V. But admitting that express notice is required to create the lien upon the unpaid purchase money, we submit that in the cases where the contracts were assigned, the record of the mortgage was notice to the assignee. The assignee would search the records to the date of his contract, and find that Stevens and Aspinwall had a good title; but from his presumed knowledge of the law, he

would know that the contract did not convey all their interest; that they still retained a right to the unpaid purchase money, which they could mortgage or sell at pleasure. Now, why was he not bound to continue his search to that time, and ascertain if they had not done so? To support this position, two principles must be established: 1. That the assignee of a contract is a purchaser. 2. That the record of the mortgage is notice to subsequent purchasers. 1. To prove the first point there is the doctrine of equitable conversion, first stated in the case of the *Lady Fohaine*, about 1647; by which the interest of a vendee under a contract is held to be real estate; so that it will descend to his heirs, (6 *John. Ch.* 401; 34 *Barb.* 173,) so as to be bound by the lien of a judgment, until the statute expressly provided otherwise, (9 *Cowen*, 73; 18 *John.* 94;) that a deed and a mortgage will convey it, (8 *Paige*, 361;) and that it will support a defense to an action of trespass. (2 *Lans.* 451.) But if they are the owners of interests in real estate, their assignees must purchase interests in real estate, and become purchasers in a court of equity. 2. They come within the definition of the recording act. (1 *R. S.* p. 762, § 37, part 2, ch. 3.) The cases of *Warner v. Winslow*, (1 *Sandf. Ch.* 438,) and *Warner v. Blakeman*, (36 *Barb.* 519, 520, affirmed 4 *Keyes*, 509,) decide, the former, that one who has paid all the purchase money; the latter, that one who has paid a part only, are purchasers within the meaning of the act, and the statute especially places an assignee upon the same footing. To prove the record notice to a subsequent purchaser, the letter of the recording act is not sufficient. But the courts have carried its construction much further, and besides the quantities of *dicta* to the effect that the record is notice, here are at least two cases where, if the rule were otherwise, the decisions would have been the other way. (*Brinckerhoff v. Lansing*, 4 *John. Ch.* 69. *Williams v. Birbeck*, 1 *Hoff. Ch.* 368.) That the cross title is no objection,

Trustees of Union College &c. v. Wheeler.

see an instance in *Purser v. Anderson*, (4 *Edw. Ch.* 20.) And it will be noticed that the inconvenience argument, which was opposed to the last point, strengthens this. Suppose a mortgagee to have given express notice to a vendee under the contract, the assignee, being a purchaser, will be unaffected by personal notice from a third party to his assignor, and it will be impossible for a mortgagee to protect himself from secret transfers, and large payments by assignees before notice. But on the other hand, it is no hardship, nor is it even an inconvenience to require an assignee, when he is about to purchase, to search down to that time against the original vendors. This point was met, on the trial, by two arguments: 1st. That all rights under a contract are referable to the date of possession under it. 2d. That the assignee would be a purchaser from a *bona fide* purchaser, and entitled to his protection. The answer to the first is, that it is true as to the rank which the contract is to take among other contracts and conveyances, but not so as to prevent the unpaid purchase money from being bound by a lien. (*See In re Oxford and Canterbury Hall Co., Law Rep. 5 Ch.* 435.) That the assignee is entitled to his assignor's protection is undoubted, but his assignor possessed two separate interests. The one was an undivided interest in fee to the extent of the unpaid purchase money; the other was a right to get the rest of the land in fee, when he had paid the rest of the purchase money. As to the former, the assignor was a *bona fide* purchaser, secure in his title, and so is the assignee; as to the latter, the assignor was liable to be compelled to pay to the mortgagee whenever he received express notice, and he has transmitted that liability.

VI. And whenever there is a lien for the unpaid purchase money, interest is to be charged upon it. (*Keirsted v. Avery*, 4 *Paige*, 16.)

VII. The judgment should be reversed, and a decree be

Trustees of Union College &c. v. Wheeler.

entered that two thirds of the land be sold to satisfy the mortgage.

B. B. and G. N. Burt, for the respondents John Aiken and others.

J. H. Towner, for the respondents Waugh and others.

I. The plaintiffs will not be permitted to enforce the alleged lien of the mortgage as against these defendants, not having deducted the value of the released premises. (*Guion v. Knapp*, 6 Paige, 35. *Stuyvesant v. Hall*, 2 Barb. Ch. 151.) 1st. It is not important as to whether or not the releases were void as against the contract purchasers or their assigns. It is sufficient that the releases discharged the released premises from the lien of the mortgage, and so defeated the equity which the contract purchasers had, to have the released premises first applied to the payment of the mortgage debt. These releases were neither good nor bad, as regarded the contract premises. The releases in no way affected the contracted premises. It is only by releasing premises which equitably were first liable for the debt, that they affected the contract premises inequitably. If the releases effectually discharged the released premises from the lien of the mortgage, then they were as good, as against these defendants, as under any circumstances it was possible that they could be. The equity that the released premises should first be sold to satisfy the mortgage is defeated; therefore equity will not allow the mortgage lien to be enforced against a prior purchaser until the value of the released premises shall have been credited upon the mortgage debt. 2d. Benjamin Nott knew of these sales. In truth and in fact he was our vendor. He received, in money, his share of the payments, and had his full share of all the proceeds of the sales. The whole contract prices were accounted for to him in the settlement. Nott's

Trustees of Union College &c. v. Wheeler.

assignees are bound by all the acts of Nott, so far as parties had dealings with him in good faith, as the owner of the mortgage; at least until the recording of the assignment. 3d. The plaintiffs cannot avoid this equity by insisting that these contract purchases were prior and not subsequent to the mortgage, and so not protected by the recording acts, because, (a.) The validity of the release only, is dependent upon the recording acts. Our right that the value of the released premises shall be credited, does not, in the least, depend upon the release, or the mode of its operation, but upon the effect which its operation produces upon our equity, that the released premises shall first be sold in satisfaction of the mortgage. Hence we are protected, not by the operation of the statute, but because, under the statute, the plaintiffs have deprived us of our right to demand that the parcels be marshalled; and because, (b.) It is not true that these contract purchases were wholly prior and not subsequent. Payments made upon the contracts after the mortgage and before the releases, gave to the purchaser so paying all the rights of subsequent purchasers, and entitled them as such, to the protection of the statute; and because, (c.) Many of the contracts were assigned, intervening the mortgage and the releases. Such assignee became a subsequent purchaser, within the definition of "purchaser" as defined in the recording act. (1 R. S. 714, *Edm. ed.*)

II. The plaintiff's claim that assignees of contracts subsequent to the record of the mortgage, are chargeable with notice of the mortgage as subsequent purchasers, has no foundation in the statute, nor does it rest upon any authority; because: 1st. All rights under the contracts are referable to the date of possession under the respective contracts. 2d. A purchaser, even with notice from a *bona fide* purchaser without notice, is entitled to all the protection which was available to the first, or *bona fide* purchaser; otherwise it might happen that the title

 Trustees of Union College &c. v. Wheeler.

of the first purchaser would be impaired by the land becoming unmarketable. (2 *Story's Eq.* § 1503, *a. Fish v. Potter*, 2 *Keyes*, 64; see foot of p. 80 and top 81.) A similar rule, and for a like reason, applies in cases of promissory notes, and in *Shell v. Tilford*, (4 *N. Y. Leg. Obs.* 307,) is stated as follows: "That where a negotiable promissory note is transferred by the payee to a *bona fide* purchaser for value, before due, he acquires a perfect title which enures to the benefit of any subsequent holder, who may collect it, although he takes it with notice that the original consideration was fraudulent." 3d. Nor can it successfully be insisted that such subsequent assignee succeeds to the rights of the assignor, as to the payments which had previously been made upon the contract, but is chargeable with notice of the mortgage, as to payments to be made subsequent to the assignment. This suggestion abandons the claim that the mortgage so recorded is a lien upon the lands in the hands of such subsequent assignee, and resolves itself simply into a claim of an equitable lien upon the purchase money unpaid at the time of such assignment. The defendant's answer to this claim will be considered in a subsequent point.

III. Benjamin Nott, the mortgagee, was and is estopped from claiming any interest in the lands hostile to the contracts. He more than stood by and saw the vendors sell the land. In truth and in fact he was one of the vendors. He received his third of all the benefits of the sales. (*Tilton v. Nelson*, 27 *Barb.* 595.) And this estoppel binds not only the mortgagee but his privies in estate, these plaintiffs. (*Tilton v. Nelson*, *supra*, p. 598. *Mason v. Lord*, 40 *N. Y.* 476, 486, 487.)

IV. This is not merely a case of tenancy in common, or merely a case in which, as between the parties, a trust existed. It is true that there was an unity of possession as between Nott, Aspinwall and Stevens, and the unity of possession constituted a tenancy in common. (*Bing.*

Trustees of Union College &c. v. Wheeler.

on *Real Estate*, 173.) It is also true, that from the payment by Nott of one-third of the purchase price, (the deed being in 1829,) a trust resulted in Nott's favor, and by the conveyance from Aspinwall to Stevens in 1830, Stevens became seised of the "Nott interest," and undoubtedly stood, in regard thereto, in the shoes of Aspinwall. The effect of this agreement between the parties, that Stevens should hold Nott's interest, is in nowise impaired, so far as this case is affected, by the fact that the agreement rested in parol. In the language of the referee's report, "Nott's interest and equities were, in fact, never denied, and he continued to reap the benefits of it until he deeded to Stevens." *Levy v. Brush*, (1 *Sweeney*, 653,) is an authority showing that, even as between the parties, the agreement would be enforced and Nott's interest protected. Much less can a stranger take advantage of any informality in the agreement, which is recognized by the parties as binding. We have, therefore, more than a tenancy in common, and more than a holding in trust. The three, Nott, Aspinwall and Stevens, were really and in fact partners, jointly and equally interested in the profits and losses. The acts of Stevens and Aspinwall were therefore the acts of all, on the principle of agency as among partners. From this it follows that the promise of these parties to pay the contract price due to the three, was made to the nominal vendors, Stevens and Aspinwall, with the assent of all, and Nott was bound by this direction to pay, at least until such time as he should give actual notice of revocation of his authority to Stevens and Aspinwall to receive such payment. It is not pretended that such notice was ever given. Hence Nott or his assigns are bound by the payments made to Stevens and Aspinwall.

V. The possession of the contract purchasers and their assigns under the contracts, was notice to all the world of the rights and equities of the purchasers in possession.

Trustees of Union College &c. v. Wheeler.

(*Moyer v. Hinman*, 3 Kern. 180, 184.) "The plaintiff in this case, being in possession under his contract, that circumstance was notice to all persons who might subsequently become interested in any way in the premises, not only of such possession, but of the terms of the contract; and of all his existing rights under it." (*Cook v. Travis*, 20 N. Y. 400. 2 *Story's Eq. Jur.* § 790. *Willard's Eq. Jur.* 298. *Wash. on Real Prop.* 506, 507. *Merithew v. Andrews*, 44 Barb. 200; see foot of p. 206 and p. 207. *Parsell v. Stryker*, 41 N. Y. 480.)

VI. The conveyance from Benjamin Nott and wife to Philo Stevens, July 18, 1833, concurrently with the execution of the mortgage, not only shows that Nott had theretofore been a joint owner and jointly interested in the property, but also may properly be regarded as a ratification and confirmation of all the previous transactions of Stevens and Aspinwall in regard to the lands, as regards his interest therein.

VII. The plaintiffs have no lien upon the purchase money unpaid upon the contracts. And herein, 1st. If the defendant's argument is sound as to the effect of the releases being to defeat the plaintiffs' rights to enforce the alleged lien, unless and except they shall first deduct the value of the released lands; the same argument will be conclusive to show that any lien which ever existed upon such unpaid purchase money, cannot now be enforced without such deduction. 2d. The relation of Nott as vendor, directing the purchaser to pay the purchase money to the hands of Aspinwall and Stevens, would call upon him as mortgagee to give actual notice of his changed relation. If it be suggested that the purchasers did not know of Nott's relation to them as vendors, the answer is suggested that neither did the purchasers know of Nott's subsequent and changed relation as mortgagee. Nott knew of both. The purchasers were ignorant of both. Equity would require that Nott, who knew all the facts,

Trustees of Union College &c. v. Wheeler.

should give the purchasers notice of his changed relation, and until he did so, payment in pursuance of his implied direction to the parties jointly interested with him, and who still had in hand their obligation, was payment to himself. 3d. These defendants dissent entirely from the proposition of the plaintiffs, that the mortgage, at the time of recording, became a lien upon the unpaid purchase money, so as to be enforced as against the purchasers, who paid the purchase money in good faith. We answer, (a.) The recording act does not give any such vitality. (b.) The case of *Gouverneur v. Lynch*, (2 Paige, 300,) upon which the plaintiffs' counsel relies, is entirely barren as to facts, and unsupported by authority. The remark relied upon by the counsel is evidently made upon the assumption that the recording is constructive notice, for it is either coupled with, or else is placed upon an equality with, and is equivalent to actual notice. (c.) The case of *TenEick v. Simpson*, (1 Sandf. Ch. 244,) cites the case of *Gouverneur v. Lynch*, but in remarking thereon makes no mention of either notice or registry. The assistant vice chancellor simply holds that the delivery of a deed which conveyed all the "estate, right, title and interest, and claim and demand whatsoever, either in law or equity, of, in and to the premises, with the appurtenances," was an assignment of the unpaid purchase money, and that upon notice to the purchaser of such assignment, the grantee became entitled to receive the unpaid purchase money; and payment to the original vendor and assignor, after such notice and claim, did not discharge the debt nor entitle the purchaser to the deed. This case would not support the proposition that a mortgagee, even after actual notice and claim of unpaid purchase money, would be entitled to demand or receive it. (d.) The case of *Smith v. Gage*, (41 Barb. 60,) is conceded to be an authority directly adverse to the plaintiffs' claim in this case, and we deny that it is at all overruled by the case of *Warner v.*

Blakeman, (4 *Keyes*, 487.) The case last mentioned simply and very clearly holds, that where a fraudulent vendor held contracts upon which there was purchase money unpaid, the court could reach and apply such money upon a judgment which was a prior lien upon the contractor's lands, and so not injure the subsequent purchasers in good faith, even though they were such purchasers from a fraudulent vendor. (e.) But it would seem as though the whole question was put at rest by the case of *Moyer v. Hinman*, (13 *N. Y.* 180.) In that case the general lien of the judgment had become a particular lien by the sale, on the execution, and the sheriff's certificate of the sale had been assigned when the payment sought to be reached was made. And it may here be properly remarked, that in the case of *Parks v. Jackson*, (11 *Wend.* 442,) the lien was not general, but a *lis pendens* had been filed, claiming a particular lien when the contract payment was made to the vendor. The whole reasoning of Judge Denio is hostile, and, we think, fatal to the plaintiffs' claim in this action. Near the bottom of page 184, he says: "But as the vendee had no notice of the judgment creditor's lien, and the creditor had full notice of the vendee's situation, it would seem to be reasonable that, in order to interrupt these payments and divert them from the vendee's hands into his own, the creditor ought at least to inform the vendee of the existence of the lien, and of his right to the unpaid purchase money." On page 186, Judge Denio, in referring to the case of *Parks v. Jackson*, states the principle upon which his decision and opinion is based, very plainly, as follows: "This case, therefore, proves something more than that judgments docketed against the vendor do not affect payments subsequently made by the vendee having no actual notice of the judgments. It establishes, in effect, that payments made by the vendee, pursuant to an (the) executory contract, are not to be considered as a fresh dealing with the vendor regarding the land. The true inference from the

Trustees of Union College &c. v. Wheeler.

case is, that such payments are referable to the original contract, and are not the purchase of a further interest in the land." He then holds that the sale converted the general into a particular lien, but nevertheless the principle was the same. The purchaser paid the money to the person to whom he gave, and who held his obligation, without notice of any adverse claim. The distinguished judge states his own opinion to be: "That a vendee in possession, under such a contract, may safely continue to pay to the vendor, until he has notice that such other person has acquired an interest in the land or in the contract." (f.) Nor can it successfully be insisted that the assignees of the contracts, subsequent to the recording of the mortgage, are subsequent purchasers in any such sense as to charge them with constructive notice of the mortgage when the assignor would not have been chargeable with such notice, because "registry of a deed or mortgage is constructive notice, only to those subsequently acquiring some interest under the grantor or mortgagor." (*Moyer v. Hinman supra*, p. 193.) In the case at bar, the assignee acquires his interest, not by any subsequent sale of the mortgage, but merely by a transfer to himself of the rights which the mortgagor had previously parted with to the assignor. In other words, the assignee is not a subsequent purchaser from the mortgagor. (g.) And again, this transfer cannot have the effect which is claimed for it as to the purchase money unpaid at the time of such transfer, from the very nature of the relation between the parties, to wit: the vendor is the vendee's trustee of the title, and the vendee is the trustee of the vendor, of the unpaid purchase money. The assignment is a mere change of the trustee, but can in nowise affect the equities, rights or liabilities resulting from the existence of the trust.

VIII It would seem to be a monstrous proposition, and an exceedingly strange equity, that a party owning an undivided interest in lands, can enter into an executory

Trustees of Union College &c. v. Wheeler.

contract for the sale of a parcel thereof, place the purchaser in possession, receive of the proceeds of the sale, convey his interest to his copartners, receive from his copartners a mortgage conveying the same lands to secure the amount due to himself from his copartners on settlement, stand by for upwards of thirty years, give no notice to his vendee of his mortgage, and allow his vendee to make payments upon the contract to the parties jointly interested with him in the proceeds of the sale, who all the time has possession of the obligation upon which the payments are made, and then, when the purchase price has been paid in full, and the lands have passed still further into the hands of *bona fide* purchasers, without notice, after a lapse of thirty or forty years, claim a lien upon the purchase money, which has been so paid. It is submitted that such is not the law. And we submit that it is quite absurd to claim that the mortgagee might assign his mortgage to a stranger, who may hold it without either proving or recording his assignment, the mortgagee, in the meantime, releasing parcels and covenanting that he was still the holder of the mortgage, and yet this stranger possess equities greater than those claimed by the mortgagee.

IX. But even if the case were put entirely upon the ground of the trust resulting in favor of Nott, while the title was in Aspinwall and Stevens, and if we exclude the principle of agency, still we have the case of a purchaser buying in good faith, paying the purchase price in full to the trustee. It is submitted that the payment is good, and at least that the purchaser cannot be called upon to pay a second time, and that to a party claiming under the trustee. (*Patten v. Gardner*, 12 *Wheat.* 498. *Hadley v. Chapin*, 11 *Paige*, 245.)

X. The plaintiff cannot have any benefit under its objection, on the trial, that in two or three instances deeds were given by Aspinwall and Stevens, without proof of written assignments of the contract. (a.) Because a writ-

Trustees of Union College &c. v. Wheeler.

ten assignment was not necessary. (b.) A direction from the purchaser to convey, was all that was necessary so far as Stevens and Aspinwall were concerned, in case they took the risk of conveying on that evidence alone. (c.) The parties holding the contracts would be estopped by their acts. (d.) Slight proof of transfer, after so long a time, would be all that would be required on the trial. (e.) An acquiescence on the part of the parties for over thirty-five years is pretty good evidence of transfer.

XI. The judgment, so far as appealed from, should be affirmed, with costs.

By the Court, MULLIN, P. J. Prior to October, 1828, James Mellen owned the premises in controversy. Mellen, by deed dated the 1st of that month, conveyed them to one Aspinwall. Aspinwall made the purchase for himself, Philo Stevens and Benjamin Nott, each of whom advanced one third of the purchase money. January 26th, 1830, Aspinwall conveyed two thirds of the said premises in fee to Stevens. Nott, as I understand the case, was equitable owner of one half of the premises conveyed to Stevens. While Aspinwall held the title, contracts were executed to sundry persons for the sale of portions of said lands. Some of the purchasers went into possession of the lands so purchased, and they or their assignees paid up the purchase money and received deeds. After the deed from Aspinwall to Stevens, other parcels of land were contracted to be sold, the purchasers entered, the contracts were paid up, and deeds given. On the 18th of July, Nott conveyed, by quit-claim deed, his interest in the premises to Stevens, and took back a bond for \$2800, and a mortgage on the premises conveyed by Mellen, as collateral. Nott, on the 1st of July, 1834, assigned the bond and mortgage to the plaintiff. After this assignment was made, Nott, without the plaintiff's knowledge or consent, released to Stevens portions of said mortgaged premises, and Stevens there-

 Trustees of Union College &c. v. Wheeler.

upon conveyed the premises so released. The lots released were then, and still are, of greater value than the amount due on the bond and mortgage. The persons purchasing prior to the mortgage to Nott, went into possession of the lands purchased; cleared portions of the same; most of them erected buildings thereon, and occupied them, and others cut and carried off timber from the said lots. Nott knew that sales of portions of the land were being made by Aspinwall and Stevens; that they received money thereupon; and his proportion was paid to him. He had no notice of the sale of any specific lots.

The referee has ordered judgment dismissing the plaintiff's complaint, as to the lands sold prior to the mortgage, and as to the lands released after the same was given, and directs foreclosure and sale only of the remainder of said lands.

The plaintiff appeals, and insists that it is not chargeable with notice of the rights of purchasers of portions of the lands, and that the release by Nott did not impair its lien on the premises released by him.

It will be unnecessary to enter upon an examination of the rights of the separate purchasers, or of the separate lots released. They may be arranged into two classes, and the principle which governs them ascertained and applied. Should there be found a case requiring a separate consideration, it will be examined by itself.

First. As to the lands sold before the mortgage was given to Nott. Nott having paid one third of the purchase money to Mellen, the conveyance to Aspinwall did not destroy that interest, and by the statute then in force a trust resulted to him in said lands, to the extent of one third part thereof. (*Jackson v. Sternbergh*, 1 *John. Cas.* 153. *Foot v. Colvin*, 3 *John.* 216. *North Hempstead v. Hempstead*, 2 *Wend.* 109. *Boyd v. McLean*, 1 *John. Ch.* 582. *Harder v. Harder*, 2 *Sandf. Ch.* 17.) This trust having been created before 1830, is not affected by the provisions relating to result-

Trustees of Union College &c. v. Wheeler.

ing trusts, in the Revised Statutes. As between Aspinwall and Stevens and Nott, the former acted as his, Nott's, agent in the sale of the trust land, and he was bound by the sales made of each of them. When the contracts were entered into, the mortgage to Nott was not in existence. If it ever became a lien on the lands under contract, it was a lien subordinate to the rights of the purchasers. If the mortgagee would acquire any interest through a subsequent mortgage, it could only be in the purchase money unpaid at the time notice of the mortgage was given to the purchasers. When the purchasers took deeds, they were under no obligation to search for liens created after the making of the contracts of purchase, and they took the land purchased discharged of all such liens. The right of the purchasers to be protected against the mortgage, does not, in my judgment, depend on whether or not the mortgagee, Nott, had actual or constructive notice of the sales to them, by reason of their occupancy. As between him and the purchasers, he is not to be treated as an incumbrancer, but as the vendor, and as such, in law, charged with knowledge of the acts of his agent who made the sale. It would be most inequitable to permit Nott to pocket his share of the price of the land, and then, having obtained a mortgage from a joint owner, upon the property sold as well as that unsold, foreclose the mortgage and sell the lands which had been paid for, in satisfaction of the debt due from his co-owner. If he can sell after a part of the purchase money is paid, he may sell after it is all paid. The law is chargeable with no such injustice. If Nott was foreclosing, I entertain no doubt but that the purchaser, prior to the mortgage, would have a perfect defense to the action. The plaintiff is found, by the referee, to be a *bona fide* purchaser for value, without notice of the contracts of sale theretofore made, or that the purchasers were in possession. By this finding, I suppose, it is meant that the plaintiff had no actual notice. That it is charged with

Trustees of Union College &c. v. Wheeler.

constructive notice by reason of such occupancy, if it was of a character to constitute notice, is too well settled to admit of a doubt. The plaintiff, being a *bona fide* purchaser of the mortgage, is not chargeable with the notice which Nott had of the rights and equities of the purchasers. (*Bush v. Lathrop*, 22 N. Y. 535, 549. *Jackson v. Henry*, 10 John. 185. *Jackson v. Van Valkenburgh*, 8 Cowen, 260. *Varick v. Briggs*, 6 Paige, 323. *Fort v. Burch*, 5 Denio, 187.) But it is chargeable with constructive notice of the interest which the purchasers had in the lands purchased by them, and which were actually occupied by them. (*Fassett v. Smith*, 23 N. Y. 252. *Cook v. Travis*, 22 Barb. 338.) The occupancy that is sufficient to charge a subsequent purchaser or incumbrancer with notice of the occupant's rights, must be open and visible, and he must actually improve the premises. Fencing, pasturing or cutting timber, is not such an occupancy as will charge a purchaser or incumbrancer with notice. (*McMechan v. Griffing*, 3 Pick. 149, and cases cited. *Cook v. Travis*, *supra*. *Troup v. Hurlbut*, 10 Barb. 354. 4 Kent's Com. 179, and notes.) The referee finds that all the purchasers of Aspinwall and Stevens, before the mortgage was given, entered into possession of the lands purchased by them severally, improved the same, and erected dwellings thereon, except John Claus, Fellows, Matteson, Weed and Bowen. We must presume, in view of this finding, that the occupancy of those who thus improved and occupied, was such as to be notice to the plaintiff of their several interests in the lands. It is found by the referee that those who are named above, soon after the date of their contracts, cut timber on the land purchased, and sold the same, and some of them cleared some part of the same land, but there was no improvement, and there was no actual occupancy by residing on the land, and receiving rents and profits thereof, except from the sale of timber. Such a possession (if it can be called such) is not notice to the plaintiff, and hence the

Trustees of Union College &c. v. Wheeler.

lands purchased by them are subject to the lien of said mortgage. The release by Nott to Stevens, being executed after the assignment to the plaintiff, but before the same was recorded, was, in the absence of any proof of notice of such assignment to Stevens, operative to release the premises described in it from the lien of the mortgage. But as this release did not impair the lien of the mortgage upon the lands embraced in it, and not sold by the mortgagor, it is not very important now to inquire to what extent the release affects the rights of the mortgagor. If the lands herein before referred to as sold, but not occupied so as to relieve them from the lien of the mortgage, are to be applied in satisfaction of the mortgage, together with those held subject to it by the referee, the release may be wholly immaterial. But if those parcels are to be treated as subject to the lien of the mortgage, and to be sold with such other land as may be subject to it, in the inverse order of alienation, the release may protect such purchasers to the extent of the value of the land released. But these questions will more properly arise for discussion on another trial of the cause, and I shall therefore omit to consider them further now.

It follows that the judgment dismissing the complaint as to the parties defendant, who own the lands contracted to be sold to the several persons herein before named, viz., John Claus, Fellows, Matteson, Weed and Bowen, must be reversed, and a new trial ordered, costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 5, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

TIFFT *vs.* MOOR.

The fact that a witness has been a convict cannot be shown by his own testimony, even on cross-examination, for the purpose of impeachment.

Where, in an action upon a promissory note, given in renewal of a former valid note, the defense of usury is set up, it is not erroneous for the judge to charge the jury that in case they find a *bonus* was added, on giving the new note, over and above the amount due on the old one surrendered, they should still find a verdict for the plaintiff for the amount which is due on the old note.

Although a charge to the jury is erroneous, yet it will not authorize a reversal of the judgment, if it can by no possibility have prejudiced the unsuccessful party.

If the error be one which did not, and could not, affect the judgment, it is no cause for reversal.

The objection that no such cause of action as that upon which the recovery was had is stated in the complaint, if not taken at the trial, is not available on appeal, even though material.

A PPEAL by the defendant from a judgment entered in favor of the plaintiff, upon the verdict of a jury. The material facts are stated in the opinion of the court.

A. M. Spooner, for the appellant.

I. The first exception is to the ruling of the judge excluding evidence to show that the plaintiff (who was examined as a witness) had been a convict. The question put and ruled out was on cross-examination of the plaintiff, with a view to discredit, not disqualify him; and on that ground was relevant. If the witness had been permitted to answer, and had answered that he was confined in prison as a convict, the effect would have been to discredit him, but not to exclude his testimony, and not within the rule requiring the record of conviction to be produced.

II. The other exceptions were as follows: To the ruling that in any event the plaintiff was entitled to recover the amount unpaid upon the original note, and the question whether he was entitled to recover the full amount of the

Tift v. Moor.

note in suit, depended upon whether an agreement was made between the parties that a bonus should be paid by the defendant to the plaintiff, for forbearance for the amount unpaid; to the ruling and charge, that if the jury found the note in suit to be usurious, the plaintiff had the right to recover on the original note the amount due thereon, on canceling the note in suit; to the refusal to charge the jury that if the note in suit was by them found to be usurious the plaintiff could not recover.

Going back to the complaint, we find two counts or causes of action only. One for the sale of a span of horses, and the other on a promissory note, to which the defense of usury was interposed. There was no attempt to prove a sale of the horses. The whole proof, on both sides, was pointed at the note set forth in the complaint. Usury was proved and disproved, and yet the judge charged the jury that the plaintiff was entitled to recover some amount, if the note was usurious; that the old note, to take up which the one in suit was given, was a valid note in his hands before the new one was made. If this charge is sustained, a party may declare on one note and recover on another, differing in amount, in date, in the time of payment, and the party to whom payable, even without proving it. To tell the jury they may find a verdict for a cause of action not alleged, is a violation of the rule that a party must recover according to the allegations in his complaint. Had the plaintiff counted upon the note given for the horses, as well as the usurious note, the charge would have been unexceptionable. Facts proved but not pleaded are never available to the party proving them, when the objection is properly taken. (*Field v. The Mayor of New York*, 2 Seld. 179.) Following the charge and giving a verdict on the note not declared on, to wit, the original note, would be a failure of proof, or verdict without proof. (*Walter v. Bennett*, 16 N. Y. 250.) If the proofs do not agree with the pleadings, it is a failure of proof, although the facts

Tift v. Moor.

proved may themselves constitute a cause of action. (*Gasper v. Adams*, 28 Barb. 441.) The cases allowing the plaintiff to fall back upon the original consideration, when the defense of usury is pleaded, are cases where the plaintiff either declared on the original consideration or on the common money counts, under which a promissory note could be given in evidence. I find no case where a party has been allowed to go back to the original consideration, without having counted on it; and especially he cannot, under the Code, where facts alone are to be pleaded. In this case there is a wide difference as to what was the original consideration. The plaintiff swears it was a note for the payment of \$290, payable all at one time, and in one year, and that the defendant tore off his name and threw the note away. The defendant swears it was a note for the payment of \$280, one half payable in six months, and the balance in a year, and that it was then in court, which leaves the case in great doubt as to what the original consideration was. And besides, no action would lie on the canceled note, but only for the consideration—the horses—and they were not sold by the plaintiff to the defendant.

III. The court instructed the jury they could find a verdict for the amount of the substituted note, if they found it free from usury; but in case it was usurious, then they could find a verdict for the amount of the original note. If either of these propositions was wrong, the verdict cannot be sustained. We claim it was error to tell the jury they could find a verdict founded on the original note; because it was not declared on, and had been canceled. It is a sound rule, that when a judge tells the jury they may find a verdict upon either of two distinct grounds, and the charge as to either is wrong, a general verdict cannot be sustained. (*Sayre v. Townsend*, 15 Wend. 647.)

IV. The defendant requested the court to charge that if the note in suit was usurious, then the plaintiff could

Tift v. Moor.

not recover, which was refused. The court should have so charged.

V. It is not for the plaintiff to say the defendant was not prejudiced by the charge, because the jury found a verdict on the substituted note. If there was error, the defendant is entitled to a new trial. If it is possible that the jury could have been influenced by an erroneous charge, it is for the plaintiff, not the defendant, to show that the error could not have influenced the verdict (*Greene v. White*, 37 N. Y. 405. *Green v. Hudson River R. R.* 32 Barb. 25-29.) It is easy to see how the jury could have been influenced by the charge. The counsel and jury could see that under this charge the plaintiff must have a verdict, and all the difference it could make with the defendant, which ever way the jury found, would be \$14.54, out of a litigation (including costs) involving \$500. No jury or counsel could give the case that attention they would if it turned wholly upon the question of usury or no usury. Some jurymen would be quite apt to yield this trifling amount against their convictions, when they saw that all the difference it could make with the defendant would be whether he paid \$203.17 and costs, or \$217.71, and costs.

VI. When, as in this case, there is a total failure of proof under one alternative of the charge, the court cannot grant leave to amend so as to retain the verdict. The least the court could do would be, on ordering a new trial, to give the plaintiff leave to amend on payment of all costs subsequent to service of the summons. (*Cottrell v. Conklin*, 4 Duer, 45.)

Butler & Parkhill, for the respondent.

I. The offer to show the witness, Harvey B. Tift, upon his cross-examination, to have been a convict, was properly overruled by the court. 1. This was equivalent to an offer to prove orally that the witness had been con-

Tift v. Moor.

victed of a specific crime, the word convict, by fair legal construction, implying a person found guilty of a crime, either by the verdict of a jury, or other legal decision. The evidence offered was, therefore, clearly inadmissible. (*Newcomb v. Griswold*, 24 N. Y. 298.) 2. The offer of the counsel clearly involved the fact of a previous conviction of a crime, and was, therefore, improper, because there was higher and better evidence, which ought to have been offered. (1 *Greenl. Ev.* § 457.) 3. The witness had already answered that he had lived in Auburn. The extent of a cross-examination of this kind is in the discretion of the court, and in this case that discretion was properly exercised. (*Real v. The People*, 42 N. Y. 270. *La Beau v. The People*, 34 *id.* 223.) 4. The exclusion of the evidence could not have worked any prejudice to the defendant, for it already distinctly appeared in evidence that the witness had been confined in the state prison at Auburn. The witness Tift had also previously testified, without objection, that he had been confined in the county jail. (*La Beau v. The People*, 34 N. Y. 223. *Hayden v. Palmer*, 2 *Hill*, 205, and cases cited.) 5. The case of *Real v. The People* is clearly distinguishable from this, so far as it relates to this question. In that case the question was, "Have you ever been in the penitentiary?" It was simply an inquiry as to whether and how long the witness had been in the penitentiary, and did not involve the fact of the conviction of the witness for a crime. The court makes this distinction in this case. (*Real v. The People*, 42 N. Y. 270.) 6. The court, in this case, having asked the counsel the object of the question, and the answer implying, to the satisfaction of the court, that the object was to prove that the witness had been convicted of a crime, no broader ground of objection than that given was necessary.

II. The ruling of the court, that in any event the plaintiff was entitled to recover the amount unpaid upon the original note, and the question whether he was entitled

Tift v. Moor.

to recover the full amount of the note in suit, depended upon whether an agreement was made between the parties that a bonus should be paid by the defendant to the plaintiff, for forbearance for the amount unpaid, was correct. 1. The complaint contains two counts; one claiming a balance of \$186, due the plaintiff for a span of horses sold and delivered to the defendant; the other upon a promissory note given to secure the payment of the said purchase money for said horses. The answer, after alleging a denial, sets up the defense of usury to the promissory note. The evidence upon the trial sustains the complaint, showing a sale of the horses to the defendant by Wetmore, as agent of the plaintiff, the giving of a promissory note for the purchase price, and the renewal of that note by executing to the plaintiff the one in suit for the balance of \$186 due thereon. 2. Exacting a premium on the renewal of a note, beyond the amount due, with legal interest, renders the new security usurious and void, but does not destroy or extinguish the antecedent debt. (*Edw. on Bills*, 354. *Swartwout v. Payne*, 19 *John*. 294. *Winsted Bank v. Webb*, 39 *N. Y.* 325.) 3. This action having been brought, as well for the original debt as upon the renewal note, if the note was void for usury, the plaintiff was still entitled to recover upon the original consideration or debt. The taking of usury, or including it in a new note, by way of the renewal of another valid note, free from such taint, does not prevent a recovery of, the sum actually due upon the valid note, although the original note was surrendered when the new note was given. (*Winsted Bank v. Webb*, 39 *N. Y.* 325. *Farmers and Mechanics' Bank v. Joslyn*, 37 *id.* 353. *Cook v. Barnes*, 36 *id.* 520.)

III. The charge of the court, that if the jury found the note in suit to be usurious, the plaintiff might still recover the balance due on the original note, it being a valid note in his hands before the note was made, was equally cor-

Tift v. Moor.

rect. 1. The antecedent debt, and the original note given to secure the same, was a good and subsisting obligation in the hands of the plaintiff at the time of the giving of the renewal note, and was in nowise canceled thereby. (*Cook v. Barnes*, 36 N. Y. 520. *Winsted Bank v. Webb*, 39 id. 325. *Farmers and Mechanics' Bank v. Joslyn*, 37 id. 353, and cases cited.) 2. No objection was made that the complaint did not contain sufficient allegations to entitle the plaintiff to recover upon the original note. The court will not allow an appellant to raise, upon the appeal, for the first time, an objection to an assumption by the court below of a doubtful fact, when he took no objection below to such assumption, but only to conclusions of law based thereon. (8 N. Y. 67. 12 id. 486. 10 Bosw. 38. *Oatman v. Taylor*, 29 N. Y. 649.) 3. But, *prima facie*, the new or renewal note was the instrument by force of which the plaintiff was entitled to recover, but it was not alone by force of that note that such right of recovery existed. The primary consideration of the indebtedness, of which that note was evidence, had not been satisfied. The original evidence of the debt had been surrendered and another note substituted, but the consideration of the latter was simply the indebtedness which formed a complete ground of indebtedness before it was given. And if, upon the whole transaction stated in the complaint, or shown by the evidence, it is clear that the plaintiff is entitled to have of the defendant a sum of money specified, there is a cause of action, and the plaintiff is entitled to recover. (*Cook v. Barnes*, 36 N. Y. 520. *Winsted Bank v. Webb*, 39 id. 325.) 4. The defendant was not in any way prejudiced by the charge of the court, for the reason that the jury, as matter of fact, by their verdict found that the new or renewal note was not tainted with usury, but was a valid note, and the verdict rendered was for the amount thereof, and not for the amount due on the original note. It is therefore perfectly plain that the defendant was not injured by the

Tift v. Moor.

charge of the court, and the record shows this quite conclusively. The amount due on the new note was \$217.71. The amount due on the original note was \$203.17. The jury found a verdict for \$217.71, the amount due on the new note.

Where an erroneous charge is made by the court, if it appear by the plaintiff's own showing, or by the record, that the error did not affect the defendant, it is not cause for reversing the judgment on appeal. (*Hayden v. Palmer*, 2 Hill, 205. *People v. Wiley*, 3 id. 194. *Greene v. White*, 37 N. Y. 405. 21 Wend. 354.)

IV. The court was right in refusing to charge, as requested by the defendant's counsel, for the reasons stated above.

By the Court, JOHNSON, J. The action is upon a promissory note given by the defendant to the plaintiff. Defense, usury. Two questions only are made by the appellant's counsel: 1st. On an exception to a ruling excluding evidence on the cross-examination of the plaintiff as a witness; and, 2d. On an exception to the charge of the judge to the jury. On the trial the plaintiff was a witness on his own behalf, in reply to the defendant's defense. On his cross-examination by the defendant's counsel, he was inquired of in regard to his having before that time lived in Auburn, and his occupation while there. On being inquired of as to the object of this examination, the defendant's counsel avowed that it was to show the witness to have been a convict.

The plaintiff's counsel objected to the evidence, and it was excluded, and exception taken. The ruling was correct. The fact of the conviction could not be shown in this way, even on cross-examination, for the purpose of impeachment. The rule is well settled. (1 *Greenl. Ev.* § 457. *Newcomb v. Griswold*, 24 N. Y. 298.)

Tift v. Moor.

The note in suit was given to take up a former note of the defendant's, which was admitted to have been a valid note. The usury, as the defendant alleged and testified, was in adding ten or twelve dollars, by way of bonus, over and above the amount actually due on the former note, for extending the time of payment one year, which the new note had to run. On this question of usury there was much conflict of evidence. The judge submitted the question of usury to the jury upon the evidence, and instructed them that in case they should find there was no usury in the note, their verdict should be for the plaintiff, for the full amount thereof, principal and interest. He also charged the jury that in case they should find that a bonus had been added, over and above the amount due on the old note surrendered, they should still find a verdict for the amount which would be due on the old note. To this charge and ruling the defendant's counsel excepted.

The jury rendered a verdict for the plaintiff for the full amount of the note in suit, finding, on the question of usury, against the defendant. If the charge had been erroneous in this particular, it would not authorize a reversal of the judgment, as it could by no possibility have prejudiced the defendant. The jury found against him on the issue of usury, and the other question was thereby rendered wholly immaterial. The error, if it was one, did not and could not affect the judgment, and is no cause for reversal. But the charge was correct as a legal proposition. (*Cook v. Barnes*, 36 N. Y. 520. *Winsted Bank v. Webb*, 39 *id.* 325. *Farmers and Mechanics' Bank v. Joslyn*, 37 *id.* 353.)

The objection now raised is, that no such cause of action was stated in the complaint. This objection was not taken or raised at the trial, and would not be available here had the question been material. Had it been taken there, it might have been obviated by an amendment on terms, or

Brown v. Cherry.

otherwise. But as the question was immaterial, in the view the jury took of the case, it is of no consequence on the appeal.

Judgment affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 5, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

• • •

WILLIAM BROWN vs. LOUISA M. CHERRY.

One equal third part of certain premises was conveyed to the plaintiff, by the then owner, at the request of S., who paid the consideration, and who requested the plaintiff to take the title to himself, and hold the premises for her. Nothing was said about the form of the deed. S. was not present when it was made, but she directed that the land should be deeded to the plaintiff, for her benefit, and supposed it had been so deeded. *Held* that the case was clearly within the section of the statute relative to a grant made to one person for a valuable consideration paid by another, (1 R. S. 728, § 51;) and that no use or trust whatever resulted or existed in favor of S., but as to her, the whole title vested absolutely in the grantee (the plaintiff.)

Held, also, that inasmuch as the plaintiff was to take the title to himself, and hold it for her, manifestly as a naked or secret trust, the presumption was, in the absence of evidence and finding of fact to the contrary, that the conveyance was made in accordance with the understanding of all the parties to the transaction. That in this respect, the case differed from that of *Loumbury v. Purdy*, (18 N. Y. 515.)

Held, further, that even if it could be found, from the evidence, that S. did not understand that the conveyance to the plaintiff was to be made absolute in its terms, or consent that it should be so made, her interest would be but an implied or resulting trust, and could not be alleged or established, to defeat or prejudice a mortgage upon the premises, executed by the plaintiff for a valuable consideration; unless the mortgagee had notice of the trust, either at the time, or before, the execution and delivery of the mortgage.

The plaintiff, being so vested with the absolute title to the premises, executed a mortgage upon the same, for a valuable consideration, to C., who had no notice, or knowledge, to put him upon inquiry as to the existence of the

Brown v. Cherry.

trust. *Held* that such mortgage was a valid and subsisting lien upon the mortgaged premises, as against any interest of S. therein. And a judgment dismissing a complaint filed by the plaintiff to enjoin the foreclosure of such mortgage was affirmed.

A PPEAL from a judgment entered upon the report of a referee.

The action was brought to enjoin the foreclosure of a mortgage, on the ground of want of consideration. The mortgage was given by the plaintiff to Chauncey W. Cherry (the husband of the defendant) on the 29th of December, 1857, for \$1500, payable five years from May 13, 1858, with annual interest.

The referee found the following facts: 1. That on the 7th day of May, 1852, George W. Hall and Chauncey W. Cherry were the owners of part of water lot 62, Syracuse, being 203½ feet, taken from the west end thereof. 2. That parcels of the land so owned by them were subject, at said time, to certain mortgages, which were, in whole or in part, unpaid, viz.: A mortgage from George W. Hall to Samuel Mead on the west 123½ feet of said land, dated November 1st, 1849, for \$1323.33; a mortgage from Chauncey W. Cherry and others to George Hooker, on the east 80 feet of said land, dated February 1, 1851, for \$700; a mortgage from Chauncey W. Cherry and others to Samuel F. Gelston and Cornelius A. Van Slyke, on the west 123½ feet of said land, dated February 5, 1852, for \$2000. 3. That on the 7th day of May, 1852, the said Chauncey W. Cherry and George W. Hall conveyed by deed, containing a covenant of general warranty, the undivided one third part of said land to John L. Langdon, for the consideration, as stated in said deed, of \$3640. This deed was recorded in the proper county, September 20, 1853. The mortgages executed by said Cherry were collateral to bonds of the mortgagors accompanying the same. 4. That on the 20th day of October, 1853, Langdon conveyed the land so conveyed to him as aforesaid, together

Brown v. Cherry.

with the undivided third part of 70½ feet of land on said lot 62, lying farther east, by deed, containing a covenant of general warranty, to William Brown, except that this deed was subject to certain mortgages on said premises, other than the Gelston and Van Slyke mortgage, aforesaid. This deed was recorded October 21, 1868. 5. That on the 15th day of December, 1856, the said Chauncey W. Cherry, being then the owner of the remaining undivided two thirds of the premises described in the deed to said Brown, last aforesaid, conveyed the same to said Brown by deed, containing a covenant against his own act, which deed was recorded March 12, 1857. 6. That at the time of the conveyance last aforesaid, one Alpheus Stewart held the equitable title to the premises conveyed, and said conveyance was made to Brown by Cherry, at the request of Stewart, upon a parol understanding between said Brown and Stewart, that Brown should hold the land for the benefit of said Alpheus. 7. That the consideration for the conveyance by Langdon to Brown aforesaid, was the transfer to said Langdon by Caroline Stewart, the wife of said Alpheus, of certain property of said Caroline; and at her instance and request the said conveyance was made to Brown, upon the parol understanding between said Brown and said Caroline, that he should hold the land for the benefit and interest of said Caroline; the trust was not expressed in the deed. That the wife of said Brown was the sister of said Caroline, and the said Cherry and Alpheus were brothers-in-law. 8. That at the time of the conveyance of the undivided two-thirds aforesaid by Cherry to Brown, there existed in addition to the mortgages aforesaid, which were liens on parts of the premises, a certain mortgage on said undivided two-thirds, executed by Cherry to George W. Hall, dated January 26, 1854, for \$3238.09. 9. That prior to the 13th day of May, 1857, proceedings had been taken, and were then pending, for the foreclosure of the mortgage to Gelston and Van Slyke. That

Brown v. Cherry.

Stewart applied to Cherry, while said foreclosure proceedings were pending, and before said 13th day of May, to advance for him, or to procure one Hopkins, the father-in law of said Cherry, to advance the money to pay and discharge the mortgage, then being foreclosed, and the said Alpheus promised to procure Brown to secure the repayment of said advances, which might be made by Cherry, or which he should procure to be made, by executing a mortgage on the land on said lot 62, owned by said Brown, or by some other security thereon. 10. That Cherry, in compliance with said application, and upon the faith of receiving the security promised as aforesaid, advanced a part from his own means, and a part from money loaned him by said Hopkins, a sum not less than \$1500, to apply in payment on said mortgage, and said mortgage was fully paid on the 13th day of May, 1857, by the application of said sum thereon, together with money furnished by said Alpheus, and said foreclosure proceedings were discontinued. 11. That afterwards, in pursuance of said promise, Stewart procured Brown to execute to Cherry the mortgage in question, to secure the repayment of the money so advanced as aforesaid, which mortgage was afterwards assigned by Cherry to Hopkins, and by Hopkins to the defendant, Louisa M. Cherry, and no part of the sum has been paid. That at the time of the commencement of this suit, the said Louisa was proceeding to foreclose the same. 12. That prior to the 13th day of May, 1857, some arrangement had been made, and which arrangement was then in force, whereby Stewart, as between him and the said Chauncey, had assumed to pay and discharge the said Gelston and Van Slyke mortgage. There was no proof as to what the specific arrangement was, but there was evidence to show that such an arrangement in substance existed. 13. That it was not proved that when Cherry advanced said money, or took said mortgage, he knew or had any notice to put him upon inquiry, that

Brown v. Cherry.

Brown held said land, or any portion of it, for the benefit or in trust for said Caroline, or that it was conveyed to him for the benefit or in trust for her. The referee held that the evidence of notice in this case was not sufficient to authorize the finding that such notice existed when the money was advanced and the mortgage given. 14. That in 1864 the mortgage from Cherry to Hall, aforesaid, was foreclosed, and the property embraced therein was sold on the foreclosure, to one Grove Lawrence. 15. That from the time of the first conveyance to Brown, aforesaid, Stewart had the full management for his wife of said property, and received the rents and profits thereof, and had full authority to act for her in respect thereto. 16. That there had never been any eviction from the premises under the Gelston and Van Slyke mortgage.

The referee found, as a conclusion of law, that the mortgage in question was a valid and subsisting lien on the premises embraced therein, and was supported by a good consideration, and that the defendant was entitled to judgment dismissing the complaint, with costs.

He therefore ordered accordingly.

From the judgment of dismissal, the plaintiff appealed.

Hunt & Green, for the appellant.

I. It is claimed that the admission of evidence of payment by Cherry, of the Gelston and Van Slyke mortgage, to establish a consideration for the mortgage in question, was error. With the payment of the Gelston and Van Slyke mortgage, the plaintiff had nothing to do as to the premises in question. Cherry was the party primarily liable to pay it, and as to it, the plaintiff had a covenant of warranty from Cherry, and it was entirely immaterial as to the plaintiff, even if Stewart had, by an agreement with Cherry, assumed to pay and protect him against it.

II. That the plaintiff was trustee of the property in question, for Mrs. Caroline A. Stewart, is beyond ques-

Brown v. Cherry.

tion. 1st. It is so found by the referee. 2d. It was so held by the general term of the fifth district, on appeal from Judge Morgan's decision. 3d. The evidence, as well as the findings of the referee, establish it. The land was deeded to the plaintiff, Mrs. Stewart paying therefor, and he really holds it for her benefit. She was not present when the deed was executed, nor did she see it, nor know the form thereof, but had directed and supposed the deed was for her benefit. (*Lounsbury v. Purdy*, 18 N. Y. 515.)

III. The plaintiff, being such trustee, can defend against the mortgage as well for himself as also for Mrs. Caroline Stewart, his *cestui que trust*. (*Code*, § 113. *Brown v. Cherry*, 38 How. Pr. 352.)

IV. That there was no consideration to Brown, the plaintiff, or to Mrs. Stewart, is apparent from the whole case, and there is no equitable consideration as to them, to support the mortgage. Cherry's paying the Gelston and Van Slyke mortgage, even if Stewart had assumed to protect him against it, forms no consideration, whatever, to the plaintiff or Mrs. Stewart for the mortgage in question. Cherry, as to them, is not a *bona fide* mortgagee. 1st. The mortgage of Gelston and Van Slyke was for him to pay, so far as the plaintiff or Mrs. Stewart was concerned. They held his covenant against it. 2d. Cherry had knowledge of the trust in Brown for Mrs. Stewart. 3d. The mortgage in question was not executed until seven months after the payment of the money. 4th. Cherry, at the time of its execution, assured Brown that it was all right, and he should have no trouble about it. 5th. Even if Cherry had disclosed to Brown the payment by him of the Gelston and Van Slyke mortgage, and requested the mortgage in question to secure to him the repayment of such moneys, and Brown had so executed it as security for Alpheus, against Cherry, a consideration to support it would still be wanting. Brown, in equity, held the land, freed from the Gelston and Van Slyke mortgage, so far as

Brown v. Cherry.

Cherry was concerned. (Equity regards that done which ought to be done.) 6th. Mrs. Stewart did not direct nor consent to the mortgage, nor know of its execution.

V. There are no equities to entitle the defendant to the mortgage in question. The assignment thereof by Cherry to Hopkins, in 1861, and his bequeathing it to his daughter, wife of Cherry, gives her no better right than her husband had; besides, if the moneys were advanced by Cherry for Alpheus Stewart, and at his request, yet Stewart had a set-off against it. Had Cherry lived, there never would have been any trouble about it. He promised Brown this, and for over ten years, nothing was heard of this mortgage by Brown or Mrs. Stewart; no principal or interest was demanded or paid, although the premises, altogether, were worth less than the face of the mortgage; and on two-thirds of it there were prior incumbrances greater than its value, and for which, said two-thirds were taken after the demands of Stewart against Cherry had been barred by the statute of limitations. We insist the attempted foreclosure of the mortgage in question cannot and ought not to succeed.

VI. The referee found that, as between the said Alpheus and Chauncey, there existed an agreement that Alpheus was to pay and discharge the Gelston and Van Slyke mortgage. Grant this; what follows? Alpheus does not perform, and the mortgage in question, even if given before the payment of the said mortgage, both at law and in equity, would have been only a security to Chauncey for the performance of said agreement. No new consideration made him a *bona fide* holder for value; and Brown, being really a trustee, could not mortgage the property as security for the debts of Alpheus. (1 *John. Cas.* 51. 12 *John.* 343. 2 *John. Ch.* 155. 4 *id.* 136. 1 *id.* 566. 10 *John.* 495. 11 *id.* 91.) Besides, the referee finds that before the assignment of the mortgage to Hopkins, Cherry owed an account, due to said Stewart, more than the

Brown v. Cherry.

amount due or to become due on said mortgage. Surely, as against a trustee who has inadvertantly given a mortgage as security merely for the debt of another, equity will enforce the equitable application of set-offs and payment, to its fullest extent. (50 Barb. 344.)

VII. The effect of the foreclosure of the mortgage in question, will be to take all of Mrs. Stewart's interest in the property, and this without her consent, or knowledge of the giving of the mortgage, and without any consideration whatever, either to her or her trustee, and against the express promise of the grantee, that her trustee should not be troubled in regard thereto; it being a mortgage got by him, so far as they are concerned, for his own accommodation. The foreclosure of the Gelston and Van Slyke mortgage, if permitted, would have taken only $123\frac{1}{2}$ feet of Mrs. Cherry's land, and left her 80 feet, and also $70\frac{1}{2}$ feet; and she would have had her remedy upon the covenants contained in the conveyances of the land before referred to, as to the $123\frac{1}{2}$ feet. The letters of Stewart to Cherry show conclusively, even those written to him after May 13, 1857, (although not competent evidence, and received against the plaintiff's objection,) that a mortgage from Brown was not contemplated or proposed until after payment of the Gelston and Van Slyke mortgage, and especially that Mrs. Stewart's third was not inserted in the mortgage until after the letter of July 30. Besides, they show that Cherry was interested in the payment of the mortgages, then liens upon the premises. The evidence as to the arrangement made by Stewart with Cherry, to take up the Gelston and Van Slyke mortgage, is necessarily in writing, and in the July letter, Stewart speaks of having made the mortgage as requested, and reminds Cherry that he would have to see to its payment. And he speaks of inserting another price; this could only refer to Mrs. Stewart's third. It is clear from the letters and evidence, that prior to the 18th of May, no

Brown v. Cherry.

security had been asked or promised, for on the 22d of May, the letter of Stewart refers to Cherry's of the 18th. A mortgage was afterwards made, but was unsatisfactory to Cherry, and not executed, and afterwards this mortgage in question, including Mrs. Stewart's third. Besides, it is to be gathered from the letters that Stewart was to make the payments, as between himself and Cherry, for he speaks of so doing if he has to borrow the money. Even in the letter of May 10, 1861, Stewart reminds Cherry that he is holden on the property, and speaks of selling part and releasing him. This could mean nothing except in reference to Cherry's outstanding covenants and bonds. That Stewart himself regarded the mortgage as inequitable, and asked its satisfaction, is shown by his letter of October 22, 1864. It is insisted that for the doings of an improvident husband, Mrs. Stewart is not to be thus deprived of her property; and that she can resist this mortgage, given without consideration, without authority, without her consent, without even her knowledge, and without either a legal or equitable consideration to support it. If so, then the plaintiff, her trustee, having executed the mortgage, under the impression that it had been directed by her, and that it was to be used for her benefit, can and ought to prevail in this action, and the judgment should be reversed and a new trial granted.

Frank Hiscock, for the respondent.

I. If, under the facts of this case, there was a resulting trust in this land, (*see Lounsbury v. Purdy*, 18 N. Y. 515,) yet Brown's deed being absolute in its terms, and Cherry having taken his mortgage without notice, (*see the finding on that point and the cases cited on the question of notice*), and for a valuable consideration moving at the time, the trust does not defeat or prejudice the mortgage. (*See 1 R. S. 678, § 54, Edm. ed.; Wood v. Robinson*, 22 N. Y. 564.)

Brown v. Cherry.

II. The mortgage was assigned by Cherry to Hopkins for value received, before due. Both Hopkins and Cherry are dead. It is nowhere pretended that Hopkins had any notice of this equity in Mrs. Stewart. Under the provisions of the statute cited, he certainly took the mortgage unprejudiced by this claim. His devisee stands in his place. (*See Griffith v. Griffith*, 9 *Paige*, 315 ; 8 *Cowen*, 260.)

III. The loan was made, and the mortgage executed, to save the estate; except, therefore, by the foreclosure of this Gelston and Van Slyke mortgage the property would have been disposed of, and equity will not suffer the mortgage to be set aside without payment of the money advanced. The power of alienation was not suspended in Brown. (*See* 1 *R. S.* 680, § 65, *Edm. ed.*)

IV. The interest of Mrs. Stewart was a latent equity; and a parol direction by her to her trustee, who had the legal estate, to mortgage the same for her benefit, would bind and estop her against thereafter questioning the mortgage. (*Worrall v. Munn*, 5 *N. Y.* 229. *Wood v. Auburn and Rochester R. R. Co.*, 8 *id.* 160.) She could do this by an agent, and might appoint her husband, as she did. (*See Knapp v. Smith*, 27 *N. Y.* 277 ; *Buckley v. Wells*, 33 *id.* 518 ; *Smith v. Sweny*, 35 *id.* 291 ; *Owen v. Cawley*, 36 *id.* 600.) The retaining the money paid by direction of Stewart, the husband, on the Gelston and Van Slyke mortgage, is an adoption and ratification of his agency by Mrs. Stewart, the wife. (*See Lawrence v. Taylor*, 5 *Hill*, 107 ; *Smith v. Sweny*, 35 *N. Y.* 291.)

V. The only exception to the admission of evidence not involved in the merits and covered by our previous points, is the admission of Stewart's letters. These letters are only material on the theory that we must depend upon our fourth point to sustain the report; and if, under the cases there cited, Stewart was the agent of his wife, the letters are competent.

VI. It is suggested that Brown received no considera-

Brown v. Cherry.

tion for his mortgage. That is of no consequence. He had the right to make a mortgage for the accommodation of Stewart or Mrs Stewart; and the question is, did the mortgagee part with a consideration.

By the Court, JOHNSON, J. The only question in this case, of any importance upon the merits, is, whether the mortgage in question is a valid and subsisting incumbrance upon the premises mortgaged, as against any interest which Mrs. Caroline Stewart may have therein.

The legal title to the premises was apparently in the plaintiff, who was the mortgagor. He held the same by virtue of two conveyances from previous owners in common, which were absolute on their faces, and apparently vested in him a complete and perfect title. It appears, however, from the evidence and the findings of the referee, that one equal third part of the said premises was conveyed to the plaintiff by the then owner, at the request of Mrs. Stewart, who paid the consideration, and who requested the plaintiff, by parol, to take the title to himself, and hold the premises for her. Nothing was said, as the referee finds, about the form of the deed. Mrs. Stewart was not present when it was made, but she directed that it should be deeded to the plaintiff, for her benefit, and supposed it had been so deeded. This, I think, brings the case clearly within the statute (1 R. S. 728, § 51) where the grant is made to one person for a valuable consideration paid by another. No trust whatever, in such case, results in favor of the person by whom the payment is made, but, as to him, the title vests absolutely in the grantee. The case does not fall within section 53 of the statute, for the reason that the title was taken in the name of the plaintiff, *with* the knowledge and consent of Mrs. Stewart, and it is not found, nor does it appear by the evidence, that she either directed or expected the conveyance to be different from what it was, in its terms. The

Brown v. Cherry.

plaintiff was to take the title to himself, and hold for her, manifestly as a naked or secret trust, and the presumption is, in the absence of evidence and finding of fact to the contrary, that the conveyance was made in accordance with the understanding of all the parties to the transaction. In this respect the case differs from that of *Lounsbury v. Purdy*, (18 N. Y. 515.) In that case it was found, as a fact, that the plaintiff intended and expected that the deed would appear, upon its face, and by its terms, to be for her benefit. That was the interpretation of the finding in that case, and the decision was placed expressly upon the ground that it was found, as matter of fact, that the deed had been taken by the alienee, as an absolute conveyance, in his own name, without the knowledge or consent of the plaintiff. No such fact is found in this case, and the law does not raise the presumption, in the absence of such finding. It certainly cannot be found or presumed, from the evidence in the case, that she designed or expected to have the conveyance in the form of a conveyance in trust, for any of the purposes authorized by statute; for her husband was allowed by her to have the sole and exclusive management and control of her interest, at all times, after the conveyance; and she testifies that he was her agent for that purpose. This view alone, in my opinion, completely sustains the referee's conclusion of law. As matter of law, the whole title was in the plaintiff, and no use or trust resulted or existed in her favor.

But even if it could be found from the evidence, as I think it cannot, that she did not understand that the conveyance to the plaintiff was to be made absolute in its terms, or consent that it should be so made, her interest would be but an implied or resulting trust, and cannot be alleged or established, to defeat or prejudice the mortgage, which was certainly given for a valuable consideration, unless the mortgagee had notice of the trust, either at the time, or before the execution and delivery of the mortgage.

Brown v. Cherry.

Upon the question of notice, the referee has expressly found, as matter of fact, that the mortgagee had no notice or knowledge to put him upon inquiry, as to the existence of the trust. The plaintiff's counsel controverts this finding of fact, and insists that it should have been found the other way. But looking at the whole case, and the entire examination of the witness by whom the notice was sought to be established, I am of the opinion that the referee was right in this finding of fact. The testimony is vague and indefinite, both as to the time and place of giving the information, and also as to its precise character. The referee had the witness before him, and could judge much better than we can whether the statements of the witness, such as they were, were entitled to sufficient credit, and carried such weight as to occasion the defeat of the mortgage which the witness himself had caused to be made.

Cherry, the mortgagee, was dead, and certainly parol evidence, of notice to him, years before the mortgage was executed, should be clear, explicit and of undoubted credit, to justify a finding that such notice had been given. The witness did not claim or pretend that any such notice was given at the time he procured the money to be advanced by the mortgagee, and the mortgage to be given by the plaintiff, but puts it at a time long anterior to that, and in a conversation on another and different topic. Upon this ground, also, the conclusion of law in the report is fully sustained. The plaintiff has no personal interest in the action, but brings it solely for the benefit of Mrs. Stewart, to prevent the foreclosure of the mortgage against what is regarded between them as her interest.

This disposition of the case upon the merits, renders it wholly unnecessary to examine the question of the admissibility of the letters of the husband in evidence. Those letters were introduced only on the question of the agency of the husband, and his authority to cause a valid mortgage to be made upon property held by or for his wife.

Merchants' Bank v. Scott.

But in either view of the case, which I have taken, and which I think is entirely conclusive against the plaintiff's right of action, that question is wholly immaterial, and could not possibly prejudice the plaintiff, even if they were improperly received. I incline, however, to the opinion that they were competent evidence, in connection with the other evidence in the case, for the purpose for which they were obviously offered and received.

The judgment must therefore be affirmed, with costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 5, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

THE MERCHANTS' BANK vs. CORNELIA M. SCOTT, impleaded, &c.

A motion for a new trial, on a case and exceptions, after final judgment has been rendered without appealing from the judgment, has not been provided for by the Code, and is entirely inconsistent with the whole plan and scheme of practice as therein prescribed.

The general term has no right to hear a mere motion for a new trial, on exceptions, where judgment has been already rendered and no appeal taken.

If judgment has been irregularly or improperly entered contrary to the order at the trial, the unsuccessful party should make his motion to have it set aside, before bringing his motion on the exceptions to argument. Otherwise he cannot appeal from the judgment.

The only practice known to the Code, when judgment has been rendered by the special term, is to review it on appeal on case and exceptions, or upon the record, if no case is made.

Where, upon the face of a note, made by a married woman, and by its express terms, the maker charges her separate estate, the case of *The Corn Exchange Ins. Co. v. Babcock*, (42 N. Y. App. 618,) is conclusive authority against her, in an action upon the note.

THIS case came before the court on a case and exceptions. The action was upon a promissory note made by the defendant, a married woman, which expressly stated that

Merchants' Bank v. Scott.

it was "for the benefit of my separate estate, upon which I make this note a lien and charge." On the trial, the jury, under the direction of the court, found a verdict in favor of the plaintiff, for the amount of the note and interest. The court granted a stay of proceedings, to enable the defendant to make and serve a case and exceptions. Judgment was subsequently entered, upon the verdict; from which no appeal had been taken.

Hammond & Winslow, for the plaintiff.

D. O'Brien, for the defendant.

By the Court, JOHNSON, J. This case is not properly before us. On the trial at the circuit, the court directed the jury to find a verdict in favor of the plaintiff for the amount of the note. It then, as appears by the case, made an order that "all proceedings be stayed on the judgment for sixty days, to enable the defendant to make and serve a case and exceptions, and that the same be heard in the first instance at general term, and in the meantime that the judgment be suspended." Final judgment has been entered, as appears by the case, and the case contains a stipulation signed by the respective attorneys of the parties, "that the foregoing is the judgment roll, case and exceptions in the within entitled action." There is no appeal from the judgment, and the defendant comes to be heard on exceptions, with a final and absolute judgment against her, from which no appeal has been taken.

The Code, section 265, provides that a motion for a new trial, on a case or exceptions, must, in the first instance, be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and the judgment be in the

Merchants' Bank v. Scott.

meantime suspended; and in that case they must be there heard in the first instance, and judgment there given. Here judgment has been entered before the exceptions are brought before the general term, and the judgment has not been appealed from, so far as appears by the case. A judgment can only be reviewed, and reversed, or affirmed, on appeal. (*Code*, § 323.) A motion for a new trial, on a case and exceptions, after final judgment has been rendered, without appealing from the judgment, has not been provided for by the Code, and is entirely inconsistent with the whole plan and scheme of practice as therein prescribed. I think the general term has no right to hear a mere motion for a new trial, on exceptions, where judgment has been already rendered and no appeal taken. The judge who tried the cause made the proper order required by the Code. But judgment has been rendered, notwithstanding, by the special term, and the record is before us as part of the case. If the judgment has been irregularly or improperly entered, contrary to the order at the trial, the defendant should make his motion to have it set aside, before bringing his motion on the exceptions to argument. Otherwise, he must appeal from the judgment. The only practice known to the Code, when the judgment has been rendered by the special term, is to review it on appeal on case and exceptions, or upon the record, if no case is made. This question, however, is not raised by the plaintiff's counsel, and the question is, whether we shall hear and consider the exceptions, or dismiss the case as improperly before us.

There is certainly no merit in the defendant's exceptions, and practically it is of little importance to her which course is taken. On the face of the note, and by its express terms, she charges her separate estate, and the case of *The Corn Exchange Ins. Co. v. Babcock*, (42 N. Y. App. 613,) is conclusive authority against her. It is suggested

Case v. Northern Central Railway Company.

that there was no evidence that she had any separate estate. But no such question was raised on the trial, and if material, cannot now be raised here.

The case was evidently tried upon the assumption that she had separate property.

Case dismissed as not properly before us.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 5, 1871. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

59 644
68h 327

CASE vs. THE NORTHERN CENTRAL RAILWAY COMPANY.

When, in an action against a railroad company, to recover the value of property claimed to have been destroyed by fire, in consequence of the defendant's negligence, it is made to appear that the injury was caused by sparks flying directly from a passing locomotive engine of the company, and alighting on the property, the burden is upon the defendant, of showing that the engine was in perfect condition, with the most approved apparatus for arresting sparks, and that such apparatus was in good order, at the time.

APPEAL by the defendant from a judgment of the county court of Ontario county, affirming a judgment rendered by a justice of the peace. The facts are sufficiently set forth in the opinion of the court.

Geo. M. Diven, for the appellant.

I. The evidence in the case did not warrant the finding of the justice. 1. The plaintiff could not recover unless it was shown that the defendant's negligence caused the injury complained of. The defendant was not guilty of negligence if it used the best precautions in known practical use for securing safety. (*Rood v. N. Y. and E. R. R. Co.*, 18 Barb. 80. *Steinway v. Erie Railway Co.*, in *Court of Appeals*, *Albany Law Journal* for Jan. 7th, 1871, p. 15,

Case v. Northern Central Railway Company.

not yet reported.) (a) 2. The undisputed evidence in the case shows that the defendant took all the precautions it could take, within the rule laid down in the cases above cited. The most approved spark arrester was used upon all the engines running on the road, and all engines were thoroughly examined every trip. 3. The defendant's witness testified that it was almost impossible for fire to

(a) The opinion of the court referred to, was as follows:

FOLGER, J. The conceded facts in the case sustain the finding of the jury, that the goods in transit on the appellant's cars, while in the appellant's charge, were destroyed by fire, kindled by sparks from the engine while in motion. The court below was warranted in instructing the jury, that the bill of lading received from the appellant, by the assignor of the respondent, formed a special contract between them. The appellant remained, however, subject to all the common law liability of a common carrier, save so far as it was exempted therefrom, by the effect of such special contract. (*Dorr v. N. J. Nav. Co.*, 1 Kern. 485. *Bissell v. N. Y. Cent. R. R. Co.*, 25 N. Y. 445.) And though by it the appellant was, in terms, released from damage or loss to the goods from or by fire, it was not relieved from liability for damage resulting by fire from its own negligence. (*York County v. Cent. R. R. 8 Wall.* 107-118.) The appellant, being a corporation, was obliged to act through natural persons. And their negligence is its negligence, when they are its agents, so as to be identical with itself. Its board of directors, or managing agents, in respect to its external relations, must be considered as so far identical with the corporation as to throw upon it the liability for their negligence. (*Perkins v. N. Y. Cent. R. R.* 24 N. Y. 213, 214.) And as upon the directors or managing agents rested the duty of providing fitting machinery for the safe and proper working of the road, it was their negligence, and hence the appellant's negligence, if this engine, used by it in hauling these goods, was, in its construction and appliances, lacking in anything which sound rules required it should have. (*Sager v. P. S. and P. and E. R. R. Company*, 81 Maine, 228.) And here arises the principal question in this case. The rule of law is, that the appellant was guilty of negligence if it adopted not the most approved modes of construction and machinery in known use in the business, and the best precautions known in practical use for securing safety. If there was known, and in use, any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property in the appellant's charge, it was negligent if it did not avail itself of such apparatus. But it was not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction. (2 *Redf. on Railways*, p. 189, ch. 24, §§ 1, 176, 8d ed. *Ford v. Lond. and*

Case v. Northern Central Railway Company.

ignite from sparks, if the netting was in good order, but he also testified that it was not possible for a locomotive engine to run and work successfully without emitting sparks. The plaintiff's own evidence shows a condition of weather at that time that would render possible what at any ordinary time would be not only almost, but quite impossible.

Sou. West. R. Co., 72 Foster & Fin. N. P. 730. Hogeman v. Western Railroad, 3 Kern. 9. Field v. N. Y. Cent. R. R. 32 N. Y. 339.) And it was a question for the jury, whether such negligence did in fact exist. (32 N. Y. 346-350. 3 Kern. 26.) The testimony on this point, as shown to us in the papers, was meagre. One witness only was called for the appellant, and he testified that it was not possible to run a locomotive without having sparks escape from it, and that there was no known method of constructing locomotives to prevent sparks escaping, and setting fire to property. One witness only was called for the respondent, and he testified that there were appliances in regard to locomotives, by which they consume their own smoke and sparks, and prevent their setting fire to property. But there was no testimony that such appliances were in practical use, or that the existence of them was known to practical men; nor was any evidence given that the appellant did not have, upon the engine, the appliances of which the respondent's witness spoke.

The court below charged the jury, that the special contract did not absolve the appellant from liability, unless the destruction of the goods was caused by an accident, over which the appellant had no control. This meant, that though the cause of the fire which consumed the goods was accidental, (if that can be said to be accidental, the cause of which may be controlled,) yet if the appellant had control over the cause, it was not relieved from liability; and this was correct. For if it had control over the cause, and did not exercise that control, that was its negligence, and for its negligence it was liable.

The court below, proceeding in the charge to the jury, called their attention particularly to the testimony of the two witnesses above alluded to, and instructed the jury that if they should decide that a locomotive can be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and that the appellant neglected to so construct its engines, it was the duty of the jury to find for the respondent, because there was a duty on the appellant to use every precaution, and adopt all contrivances known to science, to protect the goods entrusted to it for transportation. This instruction does not accord with the rule above laid down. There must exist not only the scientific power to make locomotives which will consume their own smoke and sparks, but such locomotives must have been made by skill, and put into practical use, and the use have become known, before a railway company can be charged with negligence in not putting them on to its road.

Case v. Northern Central Railway Company.

II. The county judge appears to have based his affirmation of the judgment upon the decision in *Field v. N. Y. Cent. R. R. Co.*, (32 N. Y. 339.) In that case it appeared that the defendant's engine habitually scattered fire about the time, and near the place where the fire complained of occurred, and that four or five of the engines were unprovided with the appliances to prevent the spread of fire. In the case at bar, precisely the contrary state of facts was

In *Ford v. London and S. West. R. Co.*, (2 Foster & Fin. N. P. 730,) Erie, Ch. J., charged the jury that the company was bound to take reasonable care, and to use the best precautions in known practical use for securing safety, and that it was sufficient, if it used every precaution in known practical use. In *Hegeman v. The Western R. R.* (8 Kern. 9,) the court charged the jury in substance, that although a defect was latent, yet if it could be ascertained by a known test, the defendant was responsible. On the authority of that case, it is for the jury to decide whether the adoption of any improvement in the construction of machinery is not incumbent upon a railway company. But it is for the jury so to decide upon evidence, not alone that science has invented and constructed it, but that it had been put in use, and practically tested, and become known. The charge to the jury in the court below, was incorrect in this particular. It did not lay upon the jury the duty of finding, from the testimony, whether there were in known practical use, at the time of the destruction of the goods, such appliances for locomotives as would enable them to consume their own smoke and sparks. From the charge, the jury were authorized to find for the respondent, if there were such contrivances known to science. It might be that scientific men, theorists, knew of them, and that the theory had taken shape in actual construction; and still practical men have never put them in such use—and so establish their capabilities—as that they ought to have become known to the appellant. In the absence of such experimental use and testing, the appellant was not to be held guilty of negligence in not adopting them. The charge in this respect might have misled the jury.

The counsel for the appellant requested the court to charge the jury, that the appellant was not liable if the goods were destroyed by fire, without fraud on its part, or unless they should find it guilty of fraud, or culpable negligence amounting to fraud. The court did not err in refusing so to charge. The appellant was liable, if there was negligence on its part, without regard to any supposed distinctions, or degrees of negligence. But a compliance with the request would have been an instruction to the jury by the court, that there are degrees of negligence, for one only of which the appellant was liable. Such instruction would have been erroneous. But, for the error above pointed out, the judgment of the general term should be reversed, and a new trial ordered, with costs to abide the event.

Case v. Northern Central Railway Company.

shown to exist. There was no evidence on the part of the plaintiff tending "to show want of care or dilligence in the management of the engines, or of skill in their construction." (*See op. of Davis, J., p. 350 of case last cited.*)

Spencer Gooding, for the respondent.

I. The judgment of the justice was correct, and is fully sustained and upheld by the evidence. 1. The defendant's counsel admitted, upon the trial, that by its agents it did the damage complained of, so that there can be no question upon that point, as in most cases that have been brought before the courts of a similar character. 2. The same may be said of the question of the value of the property destroyed. 3. The fact that sparks of a sufficient size and strength to ignite a fire in a field adjoining the track, escaped from the engine, raised a question of fact as to negligence on the part of the defendant, in running an engine of that character, which the justice was called upon to decide; and he decided that there was negligence, and that the defendant was therefore liable. 4. This court will not reverse a judgment, unless there is an entire want of evidence to uphold it, which is not the case here. (*Bennett v. Scutt*, 18 Barb. 347. *Wily v. Slater*, 22 id. 506. *Rogers v. Ackerman*, Id. 134. *Dunkle v. Kocker*, 11 id. 387.)

II. Although it may be conceded to be true, that the plaintiff had not made out a cause of action when he rested, still, as there was no motion for a non-suit, it was proper for the justice to take into consideration the whole evidence in the case, and if he found in the evidence introduced on the defense, sufficient to establish negligence on the part of the defendant, his judgment will be upheld. (*The Mayor, &c., of N. Y. v. Mason*, 1 Abb. 344. *S. C.*, 4 *E. D. Smith*, 142.) 1. This case was decided upon all the evidence introduced, and it makes no difference who introduced it, so long as enough was furnished, without objec-

Case v. Northern Central Railway Company.

tion by one party or the other, to sustain the judgment. 2. The judgment will not be reversed when there is some evidence to sustain it. (*O'Hara v. Brophy*, 24 How. 379. *Bennett v. Scutt*, 18 Barb. 347, and cases cited in previous point.) 3. Neither does it matter what the pleadings were, so long as the evidence was admitted without any reference to them, and without objection, and established a cause of action, whether the identical one set forth in the complaint or not. (*Johnson v. Hathorn*, 2 Keyes, 476. *Casler v. Shipman*, 35 N. Y. 533.)

III. The whole evidence, taken together, clearly establishes the fact that the fire was occasioned by reason of some defect in the spark arrester, used on the defendant's engine, and the defendant's liability is thereby fixed. 1. The defendant called the witness Strode, a master mechanic having charge of their engines at Elmira, and an expert, who testified that all the defendant's engines were furnished with the most approved spark arresters; still he could not tell what engine set this fire. Nor could he testify whether the spark arrester on this particular engine was in good order or not. 2. He also testified that engines frequently came in with their spark arresters out of order, and that engines frequently ran through from Williamsport to Canandaigua that he did not see. 3. He further testified, "*if the netting was in good order, it would be almost impossible for fire to ignite from sparks.*" And further, had "*never known sparks to ignite when I was running, when the protector was in good repair; never saw fire blow outside the track.*"

IV. The fact of the setting of the fire being admitted, as before stated, the case is completely covered by the decision of the Court of Appeals, in *Field v. The N. Y. Cent. R. R. Co.*, (32 N. Y. 339,) 1. The fire having originated from such a source, and under such circumstances, the burden of proof was on the defendant, to show that this particular engine was in good order, or the presumption

Case v. Northern Central Railway Company.

of negligence must follow. 2. This the defendant did not do, or attempt to do, and the only fair and reasonable conclusion that could follow from such evidence was that found by the justice, to wit: That the defendants were guilty of negligence in setting the fire and destroying the plaintiff's property, and was therefore liable to pay for the same. The judgments of the justice and of the county court were correct, and should be affirmed

By the Court, JOHNSON, J The action was brought in a justice's court, to recover the value of a quantity of corn stalks belonging to the plaintiff, and standing upon his land, adjoining the defendant's railroad track, and which were destroyed by fire from sparks falling directly upon them from a passing locomotive engine of the defendant. The defendant, upon the trial, admitted the cause of the injury to be as above stated, and the value of the property destroyed to have been of the amount found by the justice as damages. The judgment of the justice was affirmed by the county court.

The defendant's counsel insists that the judgment, both of the county court and of the justice, is erroneous, and should be reversed, for the reason that it was not shown affirmatively, upon the trial, by the plaintiff, that the defendant's engine, from which the sparks came at the time of the injury, had not then the most suitable and approved spark arrester upon it, nor that it was out of repair.

But this was proof for the defendant to give. When it was made to appear that the injury was caused by sparks flying directly from the engine, and alighting on the property, the burden was upon the defendant, of showing that the engine was in perfect condition, with the most approved apparatus for arresting sparks, and that such apparatus was in good order at the time. (*Field v. The New York Central Railroad*, 32 N. Y. 339.) This proof the

Fiedler v. Darrin.

defendant undertook to make, but failed to make entirely. It was unable to show which of its numerous engines caused the injury, and of course could not prove affirmatively what the condition of that particular engine was, on that occasion. Nor was it able to show, satisfactorily, that all its engines were, at all times, in perfect condition in these respects, though it undertook to make such proof. The case stood before the justice, therefore, upon the legal presumption that the engine which caused the injury was not in the proper condition; and the judgment was right. The judgment must, therefore, be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 5, 1871. *Mullin*, P. J., and *Johnson and Talcott*, Justices.]

ERNEST FIEDLER vs. HENRY A. DARRIN AND MARGARET DARRIN.

In an action of ejectment, it was proved that, in June, 1867, the legal title to the premises was in F., to whom they had been conveyed by W., in August, 1866, although he (F.) had executed a deed of the same, in October, 1866, with the name of the grantee in blank, which he had delivered to D. for his (D.'s) wife. The premises were subject to a mortgage for \$3200, given by F. to W., and by W. assigned to the plaintiff. In June, 1867, D. applied to the plaintiff for a loan of \$1500, offering \$150 for the use of it for three or four months. The plaintiff refused the application. It was finally agreed that he should *buy* the property, and should agree with Mrs. D. to sell it to her, in case she should pay within three months. Accordingly, the plaintiff's name was inserted in the blank, as grantee in said deed, and F. re-acknowledged the deed, and the same was delivered to the plaintiff, who gave his check for \$1500. The same day an agreement was executed by the plaintiff and Mrs. D., by which the former agreed to sell, and the latter agreed to buy the property for the price of \$5650, \$1650 in cash on the 24th of October, 1867, and \$3200 by bond and mortgage; and that in case she should fail to comply with the terms of sale, on the day specified, the agreement should "be null and void."

Held 1. That the conclusion of the referee, that the plaintiff was a mortgagee, and therefore could not maintain ejectment, was erroneous.

Fiedler v. Darrin.

2. That the plaintiff was something more than a mortgagee; that he was a trustee, at least of the title, substituted in the place of F., with the rights of a purchaser, to the extent of his mortgage of \$8200 and the \$1500 advanced by him.
3. That at most the defendant had a right of redemption, or a right under the contract, to a conveyance on complying with the terms of the agreement for a repurchase and resale.
4. That the agreement to pay, and to receive, \$150 over and above the actual amount of the mortgage and the money advanced, did not necessarily make the transaction usurious.
5. That considering that the plaintiff had the legal title to the premises, it was erroneous for the referee to dismiss the complaint.
6. That *time* not being of the essence of the contract, the defendant might be relieved from the default in not making payment according to the terms of said contract.
7. That the court, under section 330 of the Code, had the right to reverse, affirm or modify the judgment, as it might deem proper, and render such judgment as the referee ought to have rendered upon the clear, undisputed facts of the case.
8. That upon the finding of the referee that the plaintiff's title was in the nature of a mortgage, or conditional deed, for money loaned, he should have allowed the defendants (D. and wife) to redeem such mortgage, according to their prayer for alternative relief, and rendered judgment accordingly.

THIS action was brought to recover the possession of real estate on Staten Island. The plaintiff claimed title under a deed from one Henry A. D. Freeman. Freeman derived title from one Arnold H. Wagner, who was purchaser at a foreclosure sale, in an action in which the defendants in this action were defendants. The defendants, by their answer, alleged in substance: 1. That the deed to the plaintiff was in fact intended as security for a loan made to the defendant Margaret M. Darrin, by the plaintiff, under a usurious agreement; and, 2. That the defendant Margaret had paid off a prior outstanding mortgage on the premises, amounting to \$1050, and claimed judgment for the dismissal of the complaint, and also for affirmative relief, that the deed to the plaintiff be declared a mortgage, and adjudged void for usury; or that the defendant Margaret be allowed to redeem, or that she

Fiedler v. Darrin.

be subrogated to the rights of the holder of the \$1050 mortgage paid by her.

The plaintiff, by his reply, denied that the deed was intended as a security, and denied the alleged usury. The reply also denied knowledge or information sufficient to form a belief as to the payment of the \$1050 by the defendant Margaret, and alleged that no such payment had been made by his request or authority. The action was referred to Augustus Ford, Esq., before whom it was tried, and who reported in favor of the defendants.

The following facts were proved upon the trial: In June, 1867, the legal title to the premises was in Henry A. D. Freeman, to whom Wagner conveyed, in August, 1866, although he had signed and acknowledged a paper purporting to be a deed, dated October 9, 1866, with the name of the grantee in blank, which he had delivered to Henry A. Darrin, as Darrin testified, "for his wife." The premises at this time were subject to a mortgage for \$3200, given by Freeman to Wagner, and by Wagner assigned to the plaintiff. Mortgage dated August 20, 1866. Assignment dated September 24, 1866. At this time (June, 1867) the defendant Henry A. Darrin applied to the plaintiff for a loan of \$1500, offering \$150 for the use of it three or four months; the plaintiff says he refused this proposition; Darrin says the "question of usury was raised." It was finally arranged that the plaintiff should buy the property, and should agree with Mrs. Darrin to sell it to her in case she should pay within three months. Accordingly, the plaintiff's name was inserted in the blank, as grantee. Freeman re-acknowledged the deed, and also made an affidavit as to his title, &c. The deed, thus executed, was delivered to the plaintiff, who gave a check for \$1500, payable to Freeman's order, which check was indorsed by Freeman; and the same day an agreement was executed by the plaintiff and Mrs. Darrin, by which he agreed to sell, and she agreed to buy, the

Fiedler v. Darrin.

property for the price of \$5650; \$1650 in cash on the 24th day of October, 1867, and \$3200 by bond and mortgage, payable August 20, 1868. This agreement contained a clause by which it was agreed that if Mrs. Darrin should fail to comply with the terms of sale, on the 24th of October, 1867, "then this agreement shall be null and void."

The referee found that the loan of \$1500, the insertion of the plaintiff's name in the Freeman deed, and its delivery to him, and the contract of sale to Mrs. Darrin, were "parts of, and, taken together, constituted one transaction;" and that the deed under which the plaintiff claims title is "a security in the nature of a mortgage or conditional deed for money loaned." He found (as claimed by the appellants) both issues, as questions of fact, in favor of the defendants, but directed judgment only that the complaint be dismissed. The defendants moved, at special term, to correct the judgment, so as to give the relief claimed in the answer. The motion was denied, and the defendants appealed.

M. Hale, for the appellants.

I. The referee erred in finding that the deed from Freeman to the plaintiff was a security in the nature of a mortgage for money loaned. The circumstances of the case all show that it was not so intended; but that the transaction was a purchase by the plaintiff from Freeman, and a conditional sale by the plaintiff to Mrs. Darrin. (*Saxton v. Hitchcock*, 47 Barb. 220. *Baker v. Thrasher*, 4 Denio, 493. *Brown v. Dewey*, 2 Barb. 29. *Glover v. Payn*, 19 Wend. 518. *Flagg v. Mann*, 14 Pick. 467. *Conway's Ex'rs v. Alexander*, 7 Cranch, 218, 236, 237. *Reading v. Weston*, 7 Conn. 143. *Robinson v. Cropsey*, 2 Edw. 138.) 1. Freeman was the sole owner of the premises at the time of the negotiation. (a.) His evidence, that he had no real interest in the property, that he never gave or paid anything for the house and lot, was improperly received, and cannot be considered,

Fiedler v. Darrin.

in opposition to the language of the deed. (1 *R. S.* 728, § 51.) It was, moreover, untrue in fact. Freeman had given his bond and mortgage to Wagner for \$3200 for the house and lot, which had brought, at public sale, only \$2400, on the 1st of August, 1866. (b.) Besides, the defendants were estopped from denying that Freeman was the owner of the premises. Darrin, acting, as he says, as agent for his wife, had procured Freeman to swear to affidavits stating his ownership, upon the faith of which the plaintiff had dealt with him. (c.) The deed, with the name of the grantee in blank, in Mrs. Darrin's hands, conveyed no title. It was a nullity until completed, by inserting the plaintiff's name as grantee, by the consent of the grantor. (*Chauncey v. Arnold*, 24 *N. Y.* 330. *Hibblewhite v. McMorine*, 6 *M. & W.* 200. *Hudson v. Revett*, 5 *Bing.* 372.) 2. The intention of the parties was to effect a sale and purchase, not a loan. (a.) Such was the clear, legal import of the transaction, upon the face of the papers. The plaintiff received an absolute deed from Freeman, and paid Freeman the consideration; and the agreement with Mrs. Darrin was one of sale and purchase. (b.) Darrin applied to the plaintiff for a loan, but he refused it. Darrin urged the plaintiff to loan him money at usurious rates, recommending himself as "too honest a man to plead usury." But the plaintiff still refused. Darrin then had a paper drawn, in which it was expressly provided that the plaintiff should loan money and take a deed of the premises as security, and Darrin himself swears that this paper was rejected by Wood, the plaintiff's lawyer, because "a deed given as security for money was only a mortgage." Every proposition for a loan, or for any agreement looking to a loan, was rejected by the plaintiff. And, finally, the plaintiff reluctantly consented to buy the property, giving Mrs. Darrin a right to purchase, on or before the 24th day of October, 1867, on certain specified terms and conditions. No act or decla-

Fiedler v. Darrin.

ration, on the part of either party, subsequent to the completion of this arrangement, evinced any design to treat the transaction as anything else than what it purported to be, viz., a sale and purchase. 3. No debt existed in favor of the plaintiff against Mrs. Darrin, or indeed against any one, after the delivery to him of Freeman's deed. (a.) The mortgage upon the premises, made by Freeman, and assigned to the plaintiff by Wagner, of course became merged, upon the plaintiff's acquiring the legal title. (b.) Mrs. Darrin incurred no personal obligation to purchase the property, under the agreement. By complying with the conditions she could compel the plaintiff to convey; but if she failed to perform, the agreement was to be null and void. She had a refusal of the property, but the plaintiff could not, under the agreement, compel her to pay a dollar. 4. The consideration of the plaintiff's purchase was not inadequate.

He gave his check for	\$1500 00
His prior mortgage, merged by the deed, was	3200 00
And there was still a prior mortgage of	800 00
Making	<u>\$5500 00</u>

—besides the interest due on the mortgages, which would probably make up the consideration stated in the deed, \$5650. These same premises sold at public sale for \$2400 in August, 1866. Phelps thought them worth \$7500 when he testified in March, 1869. The referee finds that they were worth \$8000 at the time of the commencement of this action, and since. But there is no evidence of the value at the time of the purchase, except Darrin's extravagant estimate, and the public sale in August, 1866. Estimated value can seldom be obtained for property. The price brought at public sale is much better evidence of the real value. There is certainly here no such inadequacy of price as, in the language of Lord Eldon, (9 *Ves.* 234,) “shocks the conscience and amounts in itself to de-

Fiedler v. Darrin.

cisive evidence of fraud." (See *Osgood v. Franklin*, 2 *John*, Ch. 23.) If the property had depreciated in value, from destruction of the buildings, or other cause, the plaintiff must have borne the loss, and would have had no remedy over. 5. The authorities are conclusive in favor of the plaintiff upon this point. (See *Flagg v. Mann*, 14 *Pick*. 467; *Conway's Ex'rs v. Alexander*, 7 *Cranch*, 218.) The test of the distinction is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage, but if the debt be extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a re-conveyance, it is a conditional sale. (4 *Kent's Com.* 144, a.) The other authorities above cited are equally decisive in favor of the plaintiff's views of the legal effect of the transaction.

II. The legal title to the premises being in the plaintiff, when this action was brought, and the defendants' possession being under Mrs. Darrin's contract of purchase, and she being in default, the plaintiff was entitled to judgment. 1. Time in this case was expressly made the essence of the contract, and in such cases equity will not relieve where the party fails to comply by the stipulated time. (*Wells v. Smith*, 7 *Paige*, 22; affirming *S. C.* 2 *Edw.* 78. *Dominick v. Michael*, 4 *Sandf.* 374.) 2. And ejectment may be brought by a vendor of land against a vendee in possession, where the vendee is in default. (*Wright v. Moore*, 21 *Wend.* 230. *Dolittle v. Eddy*, 7 *Barb.* 74. *Hotaling v. Hotaling*, 47 *id.* 163. *Pierce v. Tuttle*, 53 *id.* 155.)

III. No usury is proved. 1. The evidence as to the purchase and assignment to the plaintiff of the \$3200 mortgage in 1866, was improperly received. It was a transaction entirely independent and distinct from that under which the plaintiff claims title. But there was no usury in it. Wagner, who bought the premises at the

Fiedler v. Darrin.

foreclosure sale, conveyed to Freeman, and took back the mortgage for the purchase money. This was a good and valid mortgage in his hands, and the plaintiff had a right to buy it at less than its face. (*See Crane v. Price*, 35 N. Y. 494.) 2. The transaction in 1867, being a purchase and agreement for sale, and not a loan, there could be no usury in it. 3. And if there was any usurious agreement, it was between the plaintiff and Freeman, and Freeman only could avoid it. The defendants have no legal privity with Freeman. (*Billington v. Wagoner*, 33 N. Y. 31. *Williams v. Tilt*, 36 *id.* 319, 326. *Chamberlain v. Dempsey*, *Id.* 144, 148, 149. *Ohio and Miss. R. R. Co. v. Kasson*, 37 *id.* 218, 224.) 4. The agreement with Mrs. Darrin was not usurious, because there was no provision by which the plaintiff was to be repaid at all events. In case the premises had depreciated in value, so as to be worth less than the amount paid by him, he must still have taken the land, and could have collected no deficiency of Mrs. Darrin. She had her option, either to pay the amount stipulated, on or before the 24th of October, and take a deed from the plaintiff, or to give up the premises. Where the principal is *bona fide* put at hazard, it is no loan, and no usury to take more than legal interest. (*Pomeroy v. Ainsworth*, 22 *Barb.* 118. *Hall v. Daggett*, 6 *Cowen*, 653. *Quackenbush v. Leonard*, 9 *Paige*, 339.)

IV. The defendants have no equities. On the contrary, the case discloses a deliberate and avowed attempt, on the part of Darrin, to entrap and defraud the plaintiff by the grossest falsehood and knavery. There is not the slightest evidence of anything like oppression or fraud on the part of the plaintiff; no reason or excuse is shown for Mrs. Darrin not performing her contract. There is no pretense of any tender or offer on her part to repay the amount actually paid by the plaintiff to Freeman. The plaintiff offered, July 1, 1867, to extend the time for payment to May 1, 1870; but no notice seems to have been taken of

Fiedler v. Darrin.

this. Everything on the plaintiff's part was fair and liberal; everything on the defendant's part, dishonest and fraudulent. Although, in doubtful cases, courts of equity have been inclined to construe contracts as mortgages, rather than as conditional sales, this has been done only to promote equity by favoring the right of redemption; and, as is well said in *Brown v. Dewey*, (2 Barb. 32,) "where the aid of the court is sought, not to establish a right of redemption, but to have a coveyance declared a mortgage, for the purpose of avoiding it on the ground of usury, the reason of the rule fails. It is the right of redemption in favor of which the court leans in doubtful cases, and not the right to have the security avoided on the ground of usury. * * Before a party is to be visited with such a penalty, he is entitled to have it established by clear and affirmative proof that he intended to make such a contract."

V. The defendants had no equities, and the plaintiff was entitled to a judgment for possession of the premises. But if it were otherwise, and the defendant Mrs. Darrin had any right remaining under the contract, the relief to be given to her should be upon terms. Asking equitable relief, she should be compelled to do equity, which would involve payment of the price stipulated by the contract, and interest and costs.

S. E. Church, for the respondents.

I. The simple questions presented by the pleadings in this action, were, 1. Whether the instrument under which the plaintiff claimed title, though a deed in form, was in fact but a mortgage, given to secure a loan of money; and, 2d. Whether, as a mortgage, it was void for usury. Either of these issues found for the defendants, would defeat the action; for, if it was but a mortgage, ejectment would not lie; and if it was usurious, it was void for any purpose. (*See below*; 3 R. S. 73, § 5; 2 N. Y. 312, § 57.) The ref-

Fiedler v. Darrin.

eree found both issues for the defendants, and dismissed the complaint. In these findings he was sustained by the most abundant evidence; they were wholly questions of fact, and if the evidence had been much less conclusive than it is, the findings would not now be disturbed. (*Woodruff v. McGrath*, 32 N. Y. 255. 28 id. 446. *Conklin v. Thompson*, 29 Barb. 218. 33 id. 347. 43 id. 40. *Murphy v. Boker*, 3 Rob. 1. 10 Bosw. 198.) 1st. The referee finds distinctly that the deed and defeasance paper, and the loan of \$1500, "constituted one transaction, and that the deed under which the plaintiff claims title and possession, is a security in the nature of a mortgage for money loaned." This makes it certain that ejectment cannot be founded upon it. (2 R. S. 312, § 57. *Sahler v. Signer*, 37 Barb. 329. 42 id. 390. 48 id. 109. *Stewart v. Hutchins*, 6 Hill, 143. 13 Wend. 485. 2d. The referee further finds that the amount of the loan was \$1500; the date, June 24; the time, four months; and that the amount agreed to be paid as interest was \$150. This renders it palpably usurious. It was void for any purpose. (3 R. S. p. 73, §§ 2, 5, 5th ed.) 3d. The legal conclusion was therefore right; the complaint should be dismissed. But the defendants now claim that this was not enough. The defendants had demanded affirmative relief, that the mortgage should be adjudged void for usury, and be delivered up and canceled. They were entitled to this. It was a cloud upon their title; it prevented a second litigation of the same matter. (*Williams v. Ayrault*, 31 Barb. 364. 38 id. 523. 16 N. Y. 519. 14 id. 9. *Beach v. Cooke*, 28 id. 508.)

II. The plaintiff took various exceptions to the admission of evidence on the part of the defendants, during the progress of the trial. It will be seen that all these exceptions related to evidence which bore directly upon the *res gestæ* of this transaction, and which was therefore admissible. 1. It is always competent to show by parol that a deed absolute on its face, was intended as a mortgage.

Fiedler v. Darrin.

(2 R. S. 756, § 3. *Swart v. Service*, 21 *Wend.* 36. 9 *id.* 227. 31 *N. Y.* 399. *Saxton v. Hitchcock*, 47 *Barb.* 220. 2 *id.* 28. 42 *id.* 390. *Tibbs v. Morris*, 44 *id.* 138. 53 *id.* 138. And the case is open to the broadest inquiry, into the whole transaction, to show the real intention. (*Per Bronson, J., in Webb v. Rice*, 1 *Hill*, 606.) 2. And it was competent to show by parol, that though the title was nominally in Freeman, the real interest was in the defendant Margaret Darrin. (*McBurney v. Wellman*, 42 *Barb.* 390.) 3. A trust in respect to real estate, may also be established by parol. (*Swinburne v. Swinburne*, 28 *N. Y.* 568.) 4. And if the mortgage was usurious, the defendants were the proper parties to set it up, as they were the parties to the instrument, and they are directly affected by it. (*Chamberlain v. Dempsey*, 36 *N. Y.* 144.) To these several points, viz., that the transaction was a loan; that it was usurious; that the real parties were plaintiff and defendants, went all the testimony, to which exceptions are taken. The exceptions are wholly unfounded. If there was any other evidence objected to, it was harmless, and did not injure the plaintiff. (*Rundle v. Allison*, 34 *N. Y.* 180. *Bronson v. Tuthill*, 3 *Keyes*, 32.) All the plaintiff's exceptions to this report, are exceptions to the referee's findings of fact. These findings are abundantly sustained by the evidence—nay, are compelled by the evidence. It was not only a plain case of a deed taken to secure a loan of money, but the loan was grossly usurious—a usury of the most biting kind—being upwards of thirty per cent of the amount loaned. The judgment should be corrected so as to adjudge the usury and declare void the deed as a mortgage, and then affirmed. (*O'Shea v. Kirker*, 8 *Abb.* 69. *Beach v. Cooke*, 28 *N. Y.* 508. 38 *id.* 383.)

By the Court, E. DARWIN SMITH, J. Upon the facts found by the referee it is quite clear that at the time of the conveyance by Freeman to the plaintiff, of the premises in

Fiedler v. Darrin.

question, the title to the said premises was in the said Henry A. D. Freeman. He held the same in trust to convey them to the defendant Margaret Darrin upon request. The deed which he executed and delivered upon her request to the plaintiff was in fulfillment of this trust. But the plaintiff, upon the execution and delivery of such deed, acquired new rights. He took the legal title as upon a purchase for \$1500 in cash, paid in hand, and the amount of the bond and mortgage given by Freeman to Wagner, on the purchase of said premises from him, for the sum of \$3200, and subject also to another mortgage of \$800, then outstanding, making the premises cost the plaintiff, in this view, the sum of \$5500. This mortgage of \$3200 was doubtless merged in the plaintiff's legal title, and such was, I think, clearly the intention of the parties, or there was no intention to keep it alive not merged. (*See Bascom v. Smith*, 34 N. Y. 320.) For the contract which the plaintiff gave the defendant Margaret Darrin, for a resale of the premises, was for the price or sum of \$5650 in one entire sum, which must have included said mortgage as part of the purchase money. The form of the transaction between these parties coincides with what the plaintiff and his attorney, Wood, testify was the real transaction—a purchase of the premises at the price aforesaid, of \$5500, with an agreement to resell the same at a future period at an advanced price of \$5650. This would not be usurious or illegal. (*Glover v. Payn*, 19 Wend. 518.) For the money actually advanced at the time, the defendant Margaret Darrin incurred no debt or liability. No money was loaned or paid to her. The \$1500 was in fact paid by check to Freeman, who held the title. If Mrs. Darrin had then held the legal title, and had conveyed the premises as a mere security for the \$1500, with an agreement on the part of the plaintiff to reconvey on the payment of \$1650, the deed would doubtless have been a mere mortgage, and would clearly have been usurious, and the referee might

Fiedler v. Darrin.

have so adjudged, and set aside the mortgage as an invalid incumbrance upon the land. This would have left the legal title in her, and she would have needed no conveyance of such title. But that is not this case. Mrs. Darrin had not the legal title. She could only get such legal title by a conveyance from the plaintiff. The referee held that the plaintiff was a mortgagee, and therefore could not maintain ejectment, and in this I think he erred. The plaintiff was something more than a mere mortgagee. He was a trustee, at least, of the title, substituted in the place of Freeman, with the rights of a purchaser to the extent of his mortgage of \$3200, and the \$1500 advanced by him. At most, the defendant had a right of redemption, or a right, under the contract, to a conveyance, on complying with the terms of the agreement for repurchase and resale. The agreement to pay and to receive \$150 over and above the actual amount of the mortgage and the money advanced, did not necessarily make the transaction usurious. In *Brown v. Lynch*, (1 Paige, 158,) Brown advanced \$1500, and took the title to the plaintiff's land, and was to have his principal and interest, and \$60 for his trouble. It was not considered that this was usurious or objectionable. In *Ryan v. Dox*, (34 N. Y. 307,) Dox took the title and advanced his own money, for which he was to receive interest, and also a compensation for his trouble. This was not disallowed as usurious, or regarded as objectionable. The agreement for the resale in this case gave the defendants from June 24, 1867, till the 24th of October following, to pay \$1650, when they were to give him a bond and mortgage for the balance of the purchase money, \$3200, payable on the 20th of August, 1868, and the plaintiff was at the same time to execute and deliver the deed of said premises, subject to the \$800 mortgage above mentioned. Considering, as I think we must, that the plaintiff had the legal title to the premises, it was error on the part of the referee to dismiss the complaint. If he had

Fiedler v. Darrin.

found that, so far as related to the \$1500 advanced by the plaintiff, the plaintiff's claim was that of a mortgagee, and that such claim was void for usury, it would not have followed that the proper judgment was to dismiss the complaint. As he did not so find, it is not the duty of this court, as a court of equity, if it has the right to do so on appeal, to draw such conclusions, and enforce a forfeiture of such sum upon that ground. It seems to me that it is rather our duty, upon the facts found and undisputed, to render such judgment as the referee should have rendered, upon the whole case. The defendants set up the facts tending to establish an equitable defense, and also asked, upon the same facts, for affirmative equitable relief. In the fourth answer, or counter-claim, the defendants ask that if said deed from Freeman to the plaintiff shall not be deemed and declared null and void, the same may be adjudged and declared to be only a lien upon said premises, by way of a mortgage, and so held by the plaintiff as security for the moneys loaned, as in said agreement mentioned, and that the defendant Margaret M. Darrin have the right to redeem the same, or to the enforcement of the said agreement to reconvey, upon the payment of the moneys in said contract mentioned, and that the said defendant is the equitable owner of the premises, subject to such payment, and for affirmative relief. *Time* was not of the essence of the contract, in the agreement between the parties, and I think the defendant may be relieved from the default in not making payment according to the terms of said contract. It is quite clear, I think, that this court, under section 330 of the Code, has the right to reverse or affirm, or modify this judgment, as it may deem proper, and render such judgment as the referee ought to have rendered upon the clear, undisputed facts of the case. (*Howard v. Freeman*, 3 *Abb. N. S.* 292. *O'Shea v. Kirker*, 8 *id.* 69. *S. C.*, 4 *Bosw.* 120. *Hannay v. Pell*, 4 *E. D. Smith*, 432.) Upon the finding of the referee, that the plaintiff's

Fiedler v. Darrin.

title was in the nature of a mortgage or conditional deed for money loaned, I think he should have allowed the defendants to redeem such mortgage according to their prayer for affirmative relief, and rendered judgment accordingly. The judgment should therefore, I think, be reversed, so far as it dismisses the complaint and gives costs to the defendants, and judgment be given that the defendant Margaret Darrin have leave to redeem said premises, or have a conveyance of the same on her compliance with the terms of the written agreement for the resale of said premises set out in the pleadings, which the plaintiff should specifically perform if the defendant shall, within four months from the time of the service of a copy of the decree or judgment herein directed, perform and fulfill the same on her part, by the payment of the principal sum and interest due the plaintiff by the terms of said agreement, with the costs of this action; and in default of such payment, that the plaintiff recover said premises, and be let into possession thereof, and recover the costs of this action.

Judgment so ordered.

[SECOND DEPARTMENT, GENERAL TERM, at Poughkeepsie, June 14, 1870.
J. F. Barnard, P. J., and *Devols* and *E. D. Smith*, Justices.]

THE PEOPLE, *ex rel.* John W. Lewis, Commissioner of Highways of the town of Lenox, *vs.* EDWIN R. WHITE, Justice of the Peace, and RONALDO O. COE, Town Clerk of Lenox.

An application, under the highway act of 1847, (*Laws of 1847, ch. 455*;) by land owners, over whose land a highway has been laid, for a re-assessment of damages by a jury, is not an *appeal*, in any sense; but is like a motion for a re-argument of the same matter before another tribunal. It is a continuation of the same proceeding, not before a higher, but a different, forum or body; and one is in nowise a review of the other.

It is no objection to such an application, or to the jurisdiction of the justice issuing the venire, that the application for a jury is made by several land owners, together, instead of separately.

Although each person injured may doubtless apply alone, yet as the same jury that is drawn to re-assess the damages upon the first application must re-assess for every other person aggrieved, upon the same highway, separate applications would seem to be superfluous. *Per* POTTER, J.

The question of *costs* creates no obstacle to a joint application; as the statute is broad enough to cover all questions that may arise, on that point.

In the absence of any positive directions in the statute, as to the manner of proceeding, and in the absence of any adjudicated case, to show error, it is safer for the court, in such a case, to hold the established rule that where a statute confers power and jurisdiction to act, in a matter, but omits to prescribe the form of proceeding, the courts will hold that all necessary powers to carry out the provisions of the act are also granted.

THIS is a *certiorari*, under the highway act of 1847, (*Laws of 1847, ch. 455*;) to review the proceedings upon a re-assessment of damages, by five land owners, over whose lands a highway had been laid, and whose damages had been assessed by commissioners appointed by the county court of Madison county. These land owners, together, applied to the town clerk of an adjoining town for a jury to be drawn in pursuance of the provisions of the 3d section of said act of 1847, and the said town clerk duly drew a jury of twelve men, according to the provisions of the 4th section of said act, and delivered the certificate thereof to the applicants. Such certificate was delivered to a justice of the peace of the said town

The People v. White.

of Lenox, who issued a venire to a constable, directing him to summon twelve jurors from the said town of Sullivan, at a time and place therein specified. On the return day, only nine of said persons so directed to be summoned as jurors, appeared. The return of the constable showed that two of the jurors named in the venire were absent from the town, and could not be found. One of the persons summoned did not appear. The relator, by his counsel, here objected, 1st. That the justice had no jurisdiction of the matter, in that the appeal was joint, while the interest of the appellants were separate; that the appeal should have been several, and not joint; that the question of costs depends, in each case, upon the question whether the damages are increased or diminished; and, 2d. That the drawing for six jurors could not proceed, as only ten of the twelve jurors had been summoned. The justice proceeded and drew six names from the jurors in attendance, who acted as jurors and assessed the damages, increasing them in each case, from the assessment made by the commissioners.

B. F. Chapman, for the relator.

E. P. Hart, for the respondents.

By the Court, POTTER, J. There was no want of jurisdiction on the part of the justice who issued the venire, on the ground that the appeal was joint. The appeal (as it is called) returned and before us, may as well be held to be several as joint. It is all in one notice, it is true, and neither the word *joint* or *several* is employed. The word *we* is once used, which is sometimes held to be joint, and sometimes several; and the word *undersigned* is also used, which is more frequently held to mean several than joint. There is nothing in the statute directing the form of proceeding; or requiring separate action;

The People v. White.

or prohibiting joint action; or making the form of proceeding at any step jurisdictional. Indeed, separate applications would seem to be superfluous, as the jury to be drawn are, by the 6th section of the act, to re-assess all the damages required to be re-assessed upon the same highway, for all persons aggrieved. So, though the applications may, I doubt not, be several, or each person may apply alone, yet the same jury that is drawn to re-assess the damages upon the first application, must re-assess for every other upon that road. Instead of the objection being limited to the words "joint" and "several," it would technically have been better to have used the terms "singly," or "aggregately;" for persons may act aggregately and still singly, and not necessarily jointly, because each utters the same complaint, and the action of the jury, in re-assessing, was several.

But the relator is in error in calling this proceeding an appeal. It is not an appeal, in any sense; it is not so termed in the statute. It is like a motion for a re-argument of the same matter before another tribunal. It is a continuation of the same proceeding, not before a higher, but a different forum or body; one is in nowise a review of the other.

In the absence of any positive directions in the statute as to the manner of proceeding, and in the absence of any adjudicated case cited to us, to show error, it is safer for the court to hold the established rule, that where a statute confers power and jurisdiction to act in a matter, but omits to prescribe the form of proceeding, the courts will hold that all necessary powers to carry out the provisions of the act are also granted. I think the proceeding in question might be sustained upon this ground alone, if necessary to stand upon it.

I think the relator's counsel is also mistaken in supposing that the question of costs cannot be regulated unless each person aggrieved proceeds separately. There is

The People v. White.

no more difficulty in regulating this in an aggregate case, than singly. The statute is broad enough to cover all questions that arise on this point. If the moving party fails to increase his assessment, he is made liable for costs; if he does increase it, the town is liable for costs. If a part of the aggrieved parties increase, and others fail to increase the assessment, only those who fail are liable. The costs are several, because the re-assessments are several, and the statute declares, "that all persons who may be liable for costs under that proceeding, shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment."

I do not think the relator has shown any error that requires a reversal of the proceedings; and the writ should be dismissed, and the proceedings affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Binghamton, June 6, 1871. *Miller*, P. J., and *Potter* and *Parker*, Justices.]



INDEX.

A

ACCOUNT.

See INTEREST.
PRACTICE, 3, 5.

ACTION.

1. It is improper to commence one action to stay proceedings in another, whether in the same court or in another court, when the plaintiff in the second action could have obtained the same relief in the original action that he may obtain in the second. *Savage v. Allen*, 291
2. If the former action is still pending, the defendant therein is not remediless. He may yet set up, therein, any defense which he has against the claim of the plaintiff. *ib*

See AGREEMENT, 1.
HUSBAND AND WIFE, 2, 3.

Removal of. *See* REMOVAL OF
ACTIONS.

AGENCY.

See INSURANCE, (LIFE.)

AGENT.

See MORTGAGE, 2.

AGREEMENT.

1. Construction.

1. P. & B. being copartners, under the firm name of P. & Co. held the title to 198 shares of the stock of a corporation, in which C. & W. were also stockholders. P. desiring a dissolution and an adjustment of the firm matters, assigned to C. his interest in such stock, C. agreeing to take legal measures to effect a settlement of the partnership, and ascertain the value of P.'s interest in such stock. As a consideration for such assignment, and to continue P. as a stockholder and director of the company, C. transferred to him ten shares of other stock owned by him, with an agreement that pending the settlement with B. each should receive the dividends of the stock; and then providing for the disposition of the stock—its amount being ascertained—as follows: If it exceeded \$1000 over and above the costs and expenses of its ascertainment, the surplus to remain for future disposal. If the interest was not enough to cover \$1000 and costs, the costs were to be paid, and the balance to be assigned to P., who was to reassign to C. the ten shares. If P. had no interest in the stock, then he was to reassign the said ten shares to C., and C. was to pay all costs and expenses. *Held*, 1. That the fair construction of the agreement was, that if any overplus remained from the interest in the 198 shares, after defraying the costs of the litigation

and reimbursing C. for the ten shares assigned to P., it was in some manner to be divided between them. 2. That the assignment was a valid transfer to C. of P.'s interest in the 198 shares of stock; and that as the defeasance showed it was transferred to enable C. to ascertain the extent of that interest, and if found to be of any value, the same was to be disposed of, between them, C. had an interest in such stock. 3. That by the assignment C. became a trustee, coupled with an interest, for whatever should be adjudged to belong to P. as a member of the firm of P. & Co.; and as such, he had the legal title; and being interested, that P. could not settle and adjust the affairs of the partnership without C.'s assent. 4. That in the absence of any evidence of delay or violation of agreement by C., or showing that he was not endeavoring by proper means to ascertain the interest of P. in the 198 shares of stock, an action could not be maintained by P. against C. to compel a reassignment by the latter to the former, of the plaintiff's interest in the 198 shares of stock, on the ground that it was a trust in the hands of the defendant, for a specific purpose, which purpose had been accomplished, or if not, which purpose had been revoked; because, (1.) There was no such fraud established as would justify the setting aside of the assignment, or declaring it void. (2.) Because C. having assumed responsibility, incurred costs and performed services, had such an interest that P. could not revoke the assignment, settle the copartnership matters, and determine what interest he had as such partner, in the 198 shares of stock, without the assent of C. (3.) Because, if C. had no interest, even, and if the power of revocation did exist, actions having been commenced by and against him, in relation to the matter, P. could not revoke the assignment, without tendering an indemnity against such actions, for all costs and damages, as well as tendering a reassignment of the ten shares. *Parks v. Comstock*, 16

2. By an agreement for the sale and purchase of real estate, the vendor covenanted to sell and convey the same as soon as the purchaser "se-

cures the payment of the "purchase price. *Held* that the word "secures" was used in its popular signification, and that signification was not equivalent to payment in money, but implied something given and received, by means of which payment might at some future time be procured or compelled. That it implied a term of credit; but how long that credit was to be, or what security should be given, was left unprovided for. *Foot v. Webb*, 88

3. Where the object of a contract is to relieve a party undertaking to perform a duty from some of the obligations and liabilities which the law imposes upon him in the absence of any express stipulation, it is to be construed in reference to that object and purpose. *Keeney v. The Grand Trunk Railway Co.* 104

4. General expressions exempting a party from liability on account of injuries to property committed to his charge, should never be held to apply to injuries arising from the wrongful acts of the party undertaking, unless it is expressly so stipulated. 16

2. Validity.

5. By an agreement for the sale and purchase of real estate, the vendor agreed to sell and convey the premises "in consideration of the sum of \$700," and the agreement was signed and sealed by both parties. *Held* that this was a sufficient statement of the consideration to satisfy the statute of frauds. *Foot v. Webb*, 88

6. The owner of a lot of land, by a written agreement, covenanted "to sell and convey all that piece or parcel of land situated on the corner of the public green, now occupied as a store," to the plaintiff, "in consideration of the sum of seven hundred dollars. To be conveyed as soon as the party of the second part [the plaintiff] secures the payment of the same." *Held* that the agreement was void for uncertainty, because it did not fix the term of credit, nor the kind or nature of the security to be given for the purchase money, and there was nothing to show that any part of such agreement rested in parol. 16

7. *Held, also*, that in an action for a specific performance of the contract, the question to be decided was not whether a reasonable credit had already been given, and whether the purchase money was not now due and payable, but whether the contract was valid when made. *ib*

See ATTORNEY.
RAILROAD COMPANIES, 4.

ALLEY.

See DEED.

ALTERATION OF INSTRUMENTS.

1. It is not every alteration that will destroy an instrument. In order to produce that effect, the alteration must be material. *Flint v. Craig*, 819

2. The general rule is that any alteration which in any event may alter the promisor's liability is material, and vitiating, if made without his consent at the time, or approval afterwards; otherwise not. *ib*

See PROMISSORY NOTES, 1 to 7.

AMENDMENTS.

If it becomes necessary for a plaintiff to amend his complaint, in order that it may appear upon its face, more clearly and specifically, by whom the service for which the action was brought was in fact performed, it may be amended upon the trial, or after the trial, to conform to the proof. *Osborn v. Nelson*, 875

See CORPORATION, 2.

ANSWER.

1. Where, in an action brought to recover dower, the defense is that the premises have been sold for taxes, and the defendant claims under the tax sale, and a lease or conveyance thereof from the corporation, the answer must aver the various matters which it will be necessary for the defendant to prove, to establish

the validity of the lease; otherwise it will be bad, on demurrer. *Nicoll v. Fash*, 275

2. Where, conceding the truth of an answer, the defendant would not be entitled to judgment, because other facts, not averred, would need to be proven, to establish the defense, the omission to plead those facts will prevent his giving evidence to support them. Hence the answer is defective. *ib*

3. Where a defendant, in his answer, states several defenses separately, and numbers them, thus showing that he meant to plead them as separate and distinct defenses, he cannot afterwards be allowed to assert that they are not so, and that a portion of the answer demurred to is merely introductory to another clause not demurred to. *ib*

See PLEADING.
PRACTICE, 5.

APPEAL.

See PRACTICE, 4, 9, 10, 12, 18.

ASSESSMENT AND ASSESSORS.

1. Where, upon the non-payment by the plaintiff of a tax assessed against him, proceedings in the nature of proceedings supplementary to execution were instituted by the supervisor of the town, before the county judge, to compel the plaintiff to pay such tax, pursuant to the statute of 1867, (*Laws of 1867, ch. 361*), under which the plaintiff was required, by an order of the county judge, forthwith to pay to the county treasurer the tax as assessed and levied, with costs, and an execution was directed to be issued therefor, to the sheriff; whereupon the plaintiff, on being served with a copy of the order, paid such amount to the county treasurer; *Held* that such payment was not, in any just or legal sense, a *voluntary* payment of the tax. *Bailey v. Buell*, 158

2. *Held, also*, that if the assessment was illegal and unauthorized, there could be no question but that the plaintiff

had been injured by it; and that, in an action brought by him against the assessors, he might recover back the amount he had been compelled to pay by reason of the wrongful assessment. *ib*

8. When, in such an action, it is claimed by the defendants that the plaintiff was, in fact and in law, a resident of the town, and liable to assessment and taxation there, the question whether the plaintiff was a resident of the town, at the time the assessment was made and completed, is a question of fact for the jury to determine upon all the evidence; and it should be submitted to them. *ib*

4. It is, under such circumstances, proper for the judge to charge the jury that they have nothing to do with the question whether the plaintiff was or was not liable to be assessed and taxed in some other town or place, but that the only question for them to determine is, whether he became a resident of the town where he was assessed, so as to warrant the assessors in assessing him there. *ib*

5. If assessors undertake to assess a person for personal property, who is not a resident of their town, they render themselves liable, in an action brought by the party wrongfully assessed, for the damages he has sustained in consequence of such illegal assessment. *ib*

6. The plaintiff in such an action is not bound to show that he is a taxable inhabitant of some other town or place, in order to maintain it; nor could the contrary be shown, by way of defense. It is enough for him to show, in such a case, that he was not a resident, and the assessors had no jurisdiction over him. *ib*

Assessments for streets—*See* NEW YORK, (CITY OF.)

ASSIGNMENT.

1. A transfer of stock, absolute and unconditional in its terms, expressing a consideration, and vesting in the assignee a complete and perfect title

to the interest of the assignor in such stock, and a written memorandum of the transaction, of the same date, signed by the same parties and a third person as surety for the assignee, executed and delivered at the same interview and in response to a demand of the assignor, for a memorandum of the transaction, must be regarded as delivered at one and the same time, for the same purpose, and should be deemed different parts of the same instrument, and construed together. *Parks v. Comstock*, 16

2. And such memorandum, being a part of the assignment, and the two one instrument, a seal to each is unnecessary; one seal will suffice for both. If a separate instrument, and executed even after the assignment, it would operate as a defeasance, in equity, and, (since the Code,) at law, though not under seal. *ib*

3. As one instrument with the assignment, such a memorandum is sufficiently stamped by placing the proper stamp upon the assignment; as a separate instrument, a stamp may be affixed to it and canceled on the trial. *ib*

4. Such a memorandum is not inoperative as a defeasance because executed by the assignee together with a third party; where it contains two parts—one defining the object and the purpose of the assignment, and the other covenanting to indemnify against costs—and the third party is only a surety for the performance of the covenant of indemnity. *ib*

Of bond and mortgage—*See* GUARDIAN.

Of a mortgage—*See* MORTGAGE, 1, 2.

See AGREEMENT, 1.

ATTACHMENT.

1. In this State a sheriff, on attachment or execution against one of several partners, may take possession of the partnership property, sell the interest of the debtor in it, and deliver the property to the purchaser. *Marshall v. McGregor*, 518

2. Hence, where an attachment has been issued against the property of one of several joint owners of a ship, at the suit of an individual creditor, upon which the sheriff has seized and taken possession of the ship, an injunction will not be issued in behalf of the other joint owners, to restrain the creditor and the sheriff from continuing in possession of, or detaining, the ship. *ib*

ATTORNEY.

1. The plaintiff, an attorney, agreed to prosecute an action of ejectment to a final judgment, in favor of the defendant, and to put him in possession of the property; and the defendant agreed to pay him, for his services, \$10,000. To secure the payment of that sum, a judgment by confession was entered, within four days. An action of ejectment was commenced by the plaintiff, in the name of the defendant, but before trial the parties to that suit compromised their differences. *Held* that the plaintiff could not enforce his judgment for the full amount thereof; the work contracted for not having been performed, in full. *Carey v. Grant*, 574
2. But that as the judgment was at any rate security for whatever sum was due to the plaintiff, it would not be proper to set it aside. Proceedings under it were directed to be stayed, however, until the amount due to the plaintiff from the defendant should be ascertained, either by a reference, or in an action upon the agreement. *ib*

B

BANKS AND BANKING.

1. It seems that deposits made with a private banker who carries on a general banking business, (such as discounting notes and receiving deposits subject to the call of the depositor,) are not to be deemed due until demand. *Fort v. McOully*, 87
2. If the banker transfers the depositor's notes before demand made of the depositor, the latter, it seems, can-

not, under the decisions of the courts of this State, enforce a set-off against the holder, either at law or in equity. *ib*

3. Where, however, a banker failed and made a general assignment of his property, including the notes of the depositor, whose deposit was not then due, and directed his assignee to pay his debts in the same order and manner in which the estate of a bankrupt is required to be used and applied for the payment of debts proved and allowed under the provisions of the bankrupt act; *Held*, that the depositor was entitled to his set-off, and that the assignee could only recover the balance after deducting the deposit. *ib*

4. Any language, whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same. This doctrine should be most rigidly applied, as against the banks. *Pope v. Bank of Albion*, 228

5. Experience has shown the necessity of relying upon the representations of the proper officers of the banks as to the existence of funds to the credit of those drawing checks upon them; and when these representations are made, sound policy requires that the banks shall be held responsible for their truth, and not be at liberty to show their falsity, as against *bona fide* holders of the checks who have purchased the same upon the strength of such representations. *Per Gzo. G. BARNARD, J.* *ib*

6. Early in February, 1866, B. drew his check on the defendant's bank, for \$8000, payable to himself or order, post dated March 1, and procured C., the assistant cashier of the bank to write "accepted, A. J. C., A. Cash." on its face. The drawer had no funds in the bank, at the time, and C. had no authority to certify or accept the check. The check was subsequently indorsed by B. to G. and by G. to the plaintiff. In an action against the bank, upon the check, the referee found as facts

that the plaintiff paid full value for the check, without actual notice of anything tending to impair its validity. *Held* that the plaintiff was entitled to recover. *ib*

7. *Held also*, that section 4 of chapter 863 of the act of 1840, as amended by chapter 251 of the laws of 1850, prohibiting a bank from issuing a note or bill not payable on demand and without interest, had no application to this case. *ib*

8. The plaintiff delivered to the First National Bank of New Orleans a draft on New York city, and the same was, in the ordinary course of business, sent by that bank to the defendant, its correspondent in New York, for acceptance and collection. The New Orleans bank failed, and its receiver gave the plaintiff an order for the draft, on the defendant, which it declined to accept, claiming to hold the draft under an agreement with said bank, by which the defendant was to hold all collection paper as collateral against overdrafts, and alleging that it had parted with money on the faith of such draft. *Held* that the evidence to show that any specific loan was made on the faith of the draft, being wholly unsatisfactory, the claim of the defendant could not be sustained, and the case fell within the authority of *Lindauer v. The Fourth National Bank*, (65 Barb. 75.) *Dod v. The Fourth National Bank of New York*, 265

BILLS OF EXCHANGE.

- L. & Co. drew a draft on the plaintiffs, to the order of F. and sent it by mail, addressed to F. at St. Louis. F. never received the draft, the letter containing it having been taken from the post office by some unauthorized person. The indorsement of the name of the payee, thereon, was a forgery. The draft, with the forged indorsement, was placed by one N. in the hands of the defendants, for collection, and they presented it to the plaintiffs, who, in ignorance of the theft and forgery, paid the amount to the defendants. The latter did not notify the plaintiffs that in making the collection they were acting as agents; and the defendants, before any demand up-

on them by the plaintiffs, paid over the proceeds to N. *Held* that the case was directly within the authority of *The Canal Bank v. Bank of Albany*, (1 Hill, 287;) and that the defendants were bound to refund the money. *Holt v. Ross*, 554

BOND AND MORTGAGE.

See GUARDIAN.

BONDS.

Of Towns—*See* RAILROADS, 8 to 19.

BOOKS OF ACCOUNT.

See EVIDENCE, 4 to 8.

C

CARRIERS.

See RAILROAD COMPANIES.

CASES COMMENTED ON, DISTINGUISHED OR LIMITED.

1. The case of *Wright v. Weeks*, (25 N. Y. 158,) distinguished from the present. *Foot v. Webb*, 38
2. The present case held to be clearly distinguishable from *The Clarke National Bank v. The Bank of Albion*, (52 Barb. 592.) *Pope v. Bank of Albion*, 226
3. The decision in *Dickerson v. Wason*, (54 Barb. 230,) should not be extended to any case not falling within the facts of that case. *Dod v. The Fourth National Bank of New York*, 265
4. The case of *Curtis v. Brooks*, (87 Barb. 476,) commented on, and declared to be inconsistent with the decision in *Dyggert v. Remerschnider*, (32 N. Y. 631.) *Wright v. Wright*, 505
5. *Strong v. Skinner*, (4 Barb. 552,) and *Ludale v. Jones*, (88 id. 523,) distinguished from the present in that the marriages, there, took place before the act of 1849 was passed. *ib*

CAVEAT EMPTOR.

See LANDLORD AND TENANT, 2.

CERTIORARI.

1. Under the common law writ of certiorari, courts have always reviewed and examined the acts, proceedings and determinations of the inferior tribunals or bodies to whom the writ was sent, so far as to see whether they had kept within their powers, or within the law under which they acted, in the matter complained of. *Per* JOHNSON, J. *The People ex rel. The Erie and Genesee Valley R. R. Co. v. Tibbs*, 401

2. If they have acted contrary to their powers, altogether, or exceeded them in any material particular, the writ furnishes a sufficient ground for the reversal of their acts or determinations. *ib*

See RAILROADS, 10.

CHATTEL MORTGAGE.

1. A chattel mortgage can be avoided for usury, by a judgment and execution creditor of the mortgagor. *Carow v. Kelly*, 289

2. A person who, like an execution creditor, asserts a lien upon mortgaged property, is not a stranger, within the meaning of the rule that the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower—that is to say, by a mere stranger. *ib*

CHECKS.

See BANKS AND BANKING 6 7.

CODE OF PROCEDURE.

See REMOVAL OF ACTIONS.

COMMISSIONERS.

To issue town bonds—See RAILROADS, 8, 18:

COMPLAINT.

1. Causes of action for *deceit* in the sale of a canal boat and horses by the defendant to the plaintiff, and for taking certain *personal property* of the plaintiff's from such canal boat, and converting the same, may, under subdivision 8, of section 167 of the Code, be united in the same complaint. *Cleveland v. Barrow*, 364

2. Fraud is a wrong ; and if a party thereby obtains from another, property, it is an injury to the property of such other, in the same sense, precisely, as though the wrongdoer had taken the property tortiously and converted it. *Per* JOHNSON, J. *ib*

8. Fraud belongs to the class of injuries denominated injuries to property. And such having been the established legal definition and classification of frauds, prior to the Code, it is to be presumed that it was intended to be, and was embraced in the classification of "injuries to property," in subdivision 8, of section 167 of the Code, when adopted by the legislature. *ib*

See AMENDMENTS.

CONSTITUTIONAL LAW.

1. The word "adoption," as used in section 15 of article 7, of the State constitution, of 1867-8, which declares that "The existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their offices until the expiration of their respective terms," means, "the adoption of this article as a part of the constitution." It does not refer to the time when the votes should be cast, and canvassed, and declared, and the people should have decided to discard the corresponding article in the former constitution, and to put the new one in its place, but to the time when the article should be fully and completely adopted as a part of the constitution. *The People ex rel. Clark v. Norton*, 169

2. It means an adoption consummated and completed, and not one *inchoate* and imperfect. *ib*

8. Accordingly, where the defendant was duly elected to the office of county judge of Wayne county, at the general election in November, 1869, for the term of four years, to commence on the 1st day of January, 1870, and took the oath of office, and entered upon the duties of the office, and continued to discharge such duties until the general election in November, 1870, *it was held* that there was no vacancy in the office, to be filled at that election; that the defendant, entering upon such office simultaneously with the adoption of such 6th article of the constitution, and being in, at such adoption, was entitled to hold his office until the expiration of the term for which he was elected. *ib*

4. The limitation, or prohibition, in respect to age, contained in section 18 of article 6 of the constitution, adopted in 1869, was not intended to apply, and does not apply, to justices and judges in office at the time of the adoption of the judiciary article as part of the constitution, but only to judges or justices appointed or elected under and in pursuance of the said 6th article. *The People ex rel. Davis v. Gardner*, 198

5. The plan adopted and sought to be carried out by article 6 was to allow every judicial officer, duly elected under the constitution and laws previously existing, to take, and to retain, his office, for the full term for which he had been elected, the same as though no change had been made, in any respect. *ib*

6. Accordingly *held* that the limitation or prohibition in respect to age, in said section 18, did not apply to a county judge who was elected at the general election in November 1869, for the term of four years, to commence on the 1st day of January, 1870, and who, pursuant to said election, entered upon and continued to perform the duties of the office. *ib*

7. In the face of the decisions of the Court of Appeals in the *Bank of Rome v. The Village of Rome*, (18 N. Y. 89;) *Starrin v. The Town of Genoa*, (23 *id.* 439;) and *Gould v. The Town of Sterling*, (*Id.* 466,) it cannot be determined that the act of the legislature, of May 18, 1869, per-

mitting municipal corporations to aid in the construction of railroads, (*Laws of 1869, ch. 907*,) is unconstitutional and void. *The People ex rel. White v. Hulbert*, 446

CONSTRUCTION.

Ses AGREEMENT, 1, 2, 8, 4.

ASSIGNMENT, 1.

LETTERS OF CREDIT.

WILL.

WRITTEN INSTRUMENTS.

CONTEMPT.

1. In a proceeding before a county judge, under the chapter of the Revised Statutes relative "to proceedings as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions," (2 R. S. 584,) the judge found that the person proceeded against had been guilty of the misconduct charged, (failing to appear before a referee and be examined, in supplementary proceedings;) and he also found, as was recited in the order made thereon, that such misconduct and contempt was calculated to, and did actually impair, impede, defeat and prejudice the rights of said plaintiff," &c.; and he was adjudged guilty of the contempt, and ordered to pay a fine, which it was expressly declared in the order, was imposed to indemnify the plaintiff in the action, not only for his costs and disbursements in that proceeding, but also "for the damage and loss sustained by said contempt, in the defeat of said proceeding." *Held* that the adjudication or order was sufficient in form, even though the preliminary recital might be somewhat defective in not stating, expressly, that it appeared that actual loss or injury had been sustained by the plaintiff in the action. *Rugg v. Spencer*, 383

2. *Held, also*, that the adjudication or order would have been valid without any such preliminary recital; and as it expressly appeared in the body of the order that the fine was imposed to indemnify the plaintiff in the judgment, "for damage and loss sustained, in defeating the supplementary proceedings, the infer-

ence was conclusive that it did so appear before the judge, and that he so found. *ib*

3. Such a recital, though a very proper formal part of an adjudication or order of that kind, is not a vital and necessary part; nor is it at all conclusive as to the facts which were made to appear before the officer, or that no other facts appeared. *ib*
4. It is sufficient, *prima facie*, for what is contained in the recital. But the recital is no evidence that nothing else was shown, or made to appear. *ib*

CORPORATION.

1. If, in an action against the trustees of a corporation, to recover a debt owing by the corporation, because of a neglect to file a report as required by law, the defendants answer that their trusteeship ceased at a certain time, it is competent for the plaintiff to show that his claim accrued prior to that time. *Miller v. White*, 484
2. And if it be objected that the complaint does not allege that fact, it is sufficient to say that the answer first raised that question; and if it be a material allegation in the complaint, and was omitted therein, and not taken advantage of by demurrer, the court has ample powers to permit an amendment, before or after judgment. *ib*
3. In an action against trustees of a corporation, seeking to charge them personally with a debt of the corporation, because of the omission to make and file the annual report required by law, the plaintiff offered testimony establishing a thorough search in the proper county clerk's office, for such report, and an examination of records and indices in the usual and accustomed place for keeping such papers and for the making of entries of the filing thereof, and that no such paper, or the filing thereof, appeared, or could be ascertained upon such search, which was twice made. The defendants offered testimony going to show the preparation of a report, and that the same was handed to one of the officers of the company for filing;

and one witness thought he saw it published in a newspaper. *Held* that the defendants' evidence did not meet the fact which the plaintiff's testimony tended to establish; and was not sufficient proof to go to a jury as to whether the report was in fact filed and published as required by the statute. *ib*

4. The settled principle is, that a creditor having once established his claim against a corporation, by judgment, shall not be compelled, in seeking a remedy against stockholders or trustees, to re-establish the fact of original indebtedness. *ib*
5. The judgment he obtains against a corporation may be impeached for fraud or collusion, but not otherwise. And both stockholder and trustee may relinquish their positions and escape liability for future obligations; but they cannot thereby change the course of proceedings, or the rules of evidence, or their liability, as to obligations previously incurred by the corporation. *ib*
6. Where the omission of a corporation to make the report required by law, and the trusteeship of the defendants, were concurrent in point of time, and the plaintiff's claim, for which he had previously recovered judgment against the corporation, accrued while the defendants were trustees; *Held* that the plaintiff was entitled to recover of the defendants the amount of such former judgment. *ib*

COUNTY COURT.

See PRACTICE, 2.

COUNTY JUDGE.

See CONTEMPT.

RAILROADS, 9, 15, 16, 17, 18.
SUPPLEMENTARY PROCEEDINGS,
1, 8.

CRIMINAL LAW.

1. In an indictment for perjury at an election, a general averment of jurisdiction in the board of inspectors to

administer the oath is sufficient, without stating in detail the names, or the number, of the inspectors who constituted the board. *Burns v. The People*, 581

2. It is not a valid objection to such an indictment that it does not state that the inspectors of election in the ward before which board the alleged perjury was committed, were acting for such ward. *ib*
3. Nor is it a valid objection that the indictment does not show the manner and form in which the oath was administered, viz., that the defendant was sworn to tell the truth, or to truly answer such questions as should be put to him by said board, touching his right to vote. If it avers that the defendant was "duly sworn, and did take his corporal oath," it means that he was sworn according to the law applicable to such a case; and embraces all that is required in the statute. *ib*
4. Neither is it a valid objection to the indictment that it does not show upon its face that the oath required by statute was administered to the defendant; if it avers that he was duly sworn and took his corporal oath before the board, and that he falsely swore that he had not voted. *ib*
5. The averment that a general election was held, at, &c., pursuant to the laws and constitution of the State, before a board of inspectors legally constituted and authorized according to law, is sufficient, in respect to the place, without stating that the place mentioned in the indictment had been legally appointed. *ib*
6. The rule is that assignments of perjury must be made by special averment negating the oath. A general allegation that the defendant swore falsely is not enough. *ib*
7. Where the false oath alleged was that the prisoner had sworn that he had not voted at the election, and the assignment of the perjury was that he had voted previously at said election, at the 4th ward, "at the house of T. L. W. in said ward," without stating that he voted before a board of officers duly constituted and authorized according to law, or that any lawful election had been appointed; *Held* that the assignment was too general and uncertain, and was not explicit enough to support itself, or to show that the defendant committed the crime. *POTTER, J., dissented.* *ib*
8. In the absence of any averment to that effect, it will not be inferred that the election was lawfully held at the place named. *ib*
9. Such a defect is a substantial one, and not merely formal; and is not obviated by the statute of jeofails. *ib*

D

DEED.

1. M. and wife, being the owners of a piece of land, laid out the same into village lots, and made and filed a map thereof, which embraced an alley, designated thereon as "South alley." They subsequently conveyed three of such lots, by their numbers as described on such map, to the plaintiff, by deeds bounding such lots "along the north line of South alley," and described them as lots known and distinguished on a map of village lots owned by the grantors, by the numbers mentioned in the deeds, with the appurtenances. *Held* that neither the grantors, nor those deriving title from them, to the land described as an alley, could inclose it, and exclude the plaintiff, and his heirs and assigns, from using the alley as a way. *Cox v. James*, 145
2. *Held, also*, that the reference, in the conveyances, to the map on which the lots conveyed were described, introduced the map into the deeds, and made it a parcel of the deeds, and the grantees were entitled to the use of the alley, along which their lots were described as lying, as appurtenant to the grants. *ib*
3. One equal third part of certain premises was conveyed to the plaintiff, by the then owner, at the request of S., who paid the consid-

eration, and who requested the plaintiff to take the title to himself, and hold the premises for her. Nothing was said about the form of the deed. S. was not present when it was made, but she directed that the land should be deeded to the plaintiff, for her benefit, and supposed it had been so deeded. *Held* that the case was clearly within the section of the statute relative to a grant made to one person for a valuable consideration paid by another, (1 R. S. 728, § 51;) and that no use or trust whatever resulted or existed in favor of S., but as to her, the whole title vested absolutely in the grantee (the plaintiff.) *Brown v. Cherry*, 628

5. *Held, also*, that inasmuch as the plaintiff was to take the title to himself, and hold it for her, manifestly as a naked or secret trust, the presumption was, in the absence of evidence and finding of fact to the contrary, that the conveyance was made in accordance with the understanding of all the parties to the transaction. That in this respect, the case differed from that of *Lounsbury v. Purdy*, (18 N. Y. 515.)

6. *Held, further*, that even if it could be found, from the evidence, that S. did not understand that the conveyance to the plaintiff was to be made absolute in its terms, or consent that it should be so made, her interest would be but an implied or resulting trust, and could not be alleged or established, to defeat or prejudice a mortgage upon the premises, executed by the plaintiff for a valuable consideration; unless the mortgagee had notice of the trust, either at the time, or before, the execution and delivery of the mortgage.

See POWER IN TRUST.

DEFENSE.

See PRACTICE 1.

DEPOSITS.

See BANKS AND BANKING, 1, 2, 3.

DEVISE.

In case of a devise over, which for any reason is incapable of taking effect, and is therefore inoperative, it seems, that such devise leaves the estate in the first taker, the same as if the devise over had not been attempted. *Per* MORGAN, J. *Smiley v. Bailey*, 80

DEVISEES.

See EXECUTORS AND ADMINISTRATORS, 2.

DISCRETION.

See PRACTICE, 4.

E

ELECTIONS.

Perjury at—*See* CRIMINAL LAW.

ESTATES.

1. Where the ultimate remainder in fee is limited upon two lives in being at the time of the grant, it will not be defeated by the creation and failure of an intermediate trust estate. *King v. Whaley*, 71

2. No degree of contingency of an enjoyment in possession by the remainderman will operate to prevent his estate from being regarded as vested. *Per* MORGAN, J. *Smiley v. Bailey*, 80

See DEVISE.

ESTOPPEL.

See BANKS AND BANKING, 4.

EVIDENCE.

1. In an equity action, the court will not reverse the judgment on account of the admission of improper evidence, if from the whole case it appears that such evidence could not have changed the result. *King v. Whaley*, 71

2. *It seems* where one of several owners enters into the actual possession of land under a deed which purports to convey the entire interest, it will not be presumed, without other evidence, that his possession is hostile to the remaining owners. *ib*
 8. The declarations of the tenant, in such a case, though perhaps unnecessary, are competent evidence to restrict his claim and show that it is not adverse. *ib*
 4. In an action for goods sold and delivered, and to recover the balance of an account, day-books and books of original entries, not kept by the plaintiffs themselves, but by book keepers employed for that purpose, and who did not make the sales charged by them, but only entered the sales reported to them by the salesmen, are not admissible in evidence for the purpose of proving the entries of sales, on proof of handwriting; which sales are not remembered by the persons making the same; and where the sale has not been proven, apart from the book. *Gould v. Conway*, 355
 5. Such books, as books of account, are incompetent witnesses for any purpose. Of themselves they can neither prove, nor tend to prove, anything. The entries being all made by third persons, are mere written statements of others—no better than hearsay. *ib*
 6. Nor can such entries be properly received in evidence as original memoranda, to aid in establishing the defendant's indebtedness. *ib*
 7. Yet it seems, that in such a case, if it appears that the salesman who reported a sale saw the charge made by the book-keeper, and knew, then, that it was correctly made, it may be introduced as a memorandum, in connection with the testimony of the salesman, either with or without the testimony of the book-keeper, the salesman having forgotten the fact that such sale was made by him. *ib*
 8. There is no case, or rule of evidence, which holds that the books of account of a party are proper evidence to prove an indebtedness against another, where such books have not been kept by a clerk employed by him. *Per JOHNSON, J. ib*
 9. When issues are formed, by the pleadings, testimony pertinent to such issues is admissible. Hence, if the plaintiff, in addition to the matters set forth in the complaint, testifies, upon a commission, as to matters not embraced in the complaint, but distinctly raised and presented as a defense by the answer, it cannot be held as error to admit the testimony. *Miller v. White*, 484
 10. Defendants objected, on the trial, to the introduction of a judgment roll in evidence, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The answers, which were a part of the judgment roll, showed that the defendants had been brought into court. *Held* that if the clerk of the court omitted to annex the summons to the judgment roll, as it was his duty to do, the omission would not deprive the prevailing party of his rights. And that with respect to the minutes of trial, inasmuch as the judgment roll showed a trial before the judge, without a jury, his findings in favor of the plaintiff, and directions for judgment, it appeared to meet the requirements of the Code, (§ 281;) except in respect to the summons. *ib*
 11. And that as to its sufficiency, or the effect of any irregularity, the judgment roll was not a nullity. *ib*
- See CONTEMPT, 4.
CORPORATION, 8.
PRACTICE, 5.
SUPPLEMENTARY PROCEEDINGS.
- ### EXECUTORS AND ADMINISTRATORS.
1. A trustee, making a sale of the trust property, cannot become a purchaser on his own account, either directly or through the agency of another. *Terwilliger v. Brown*, 9
 2. Thus, if an executor, selling property under the order of the surrogate, for the payment of debts, becomes himself interested in a purchase thereof made by one employed by him to act as auctioneer, and

who thus becomes his sub-agent, a residuary devisee may come into a court of equity, and set aside the sale, and have the property resold. *ib*

8. Upon a sale of lands by an executor, under the order of the surrogate, for the payment of debts, B., officiating as auctioneer, struck off the premises to himself. Before the confirmation of the sale, the payment of the purchase money, or the delivery of the deed to B., an arrangement was made between him and the executor, by which the latter became equally interested with the former in the purchase of the property. The sale was subsequently confirmed by the surrogate, and a conveyance of the premises executed by the executor to B., who, on the same day, conveyed an equal undivided half of said premises to the executor. *Held* that neither B. nor the executor could be protected against the claims of those interested in the estate directed to be sold; the purchase being a palpable violation of the statute, and in direct hostility to the well established principle, that a trustee shall not be allowed, directly or indirectly, to speculate out of the trust property, or to become a purchaser thereof for his own benefit. *ib*

F

FORGED DRAFT.

See **BILLS OF EXCHANGE.**

FRAUD.

See **COMPLAINT.**

FRAUDS, STATUTE OF

See **AGREEMENT, 5.**

G

GUARDIAN.

1. Where real estate belonging to infants is sold by order of the county court, and a bond and mortgage

given to the special guardian (who is also general guardian) of the infants, to secure the payment of a part of the purchase money, he has power to sell and assign such bond and mortgage, and can, by such sale and assignment, give the purchaser a perfect title thereto. *Tuttle v. Heavy,* 884

2. No order, from any court, is necessary to enable a guardian to make such an assignment, or to establish its validity. *ib*

H

HIGHWAYS.

1. An application, under the highway act of 1847, (*Laws of 1847, ch. 456*), by land owners, over whose land a highway has been laid, for a re-assessment of damages by a jury, is not an *appeal*, in any sense; but is like a motion for a re-argument of the same matter before another tribunal. It is a continuation of the same proceeding, not before a higher, but a different, forum or body; and one is in nowise a review of the other. *The People ex rel. Lewis v. White,* 666

2. It is no objection to such an application, or to the jurisdiction of the justice issuing the venire, that the application for a jury is made by several land owners, together, instead of separately. *ib*

8. Although each person injured may doubtless apply alone, yet as the same jury that is drawn to re-assess the damages upon the first application must re-assess for every other person aggrieved, upon the same highway, separate applications would seem to be superfluous. *Per Porter, J.* *ib*

4. The question of *costs* creates no obstacle to a joint application; as the statute is broad enough to cover all questions that may arise, on that point. *ib*

5. In the absence of any positive directions in the statute, as to the manner of proceeding, and in the absence

of any adjudicated case, to show error, it is safer for the court in such a case, to hold the established rule that where a statute confers power and jurisdiction to act, in a matter, but omits to prescribe the form of proceeding, the courts will hold that all necessary powers to carry out the provisions of the act are also granted. 3

HUSBAND AND WIFE.

1. Where a husband abandons his wife and family, ceases to provide them, and, so far as he can, renounces his marital relations, and goes to California, where he has ever since remained, this is equivalent to abjuring the realm, by a husband, at common law; so as to enable the wife to sue and be sued as a *feme sole*. *Osburn v. Nelson*, 375
2. A claim for the services of her infant son, which has been assigned to her, is the separate estate of the wife, in such a case; and under our statutes for the better protection of the rights of married women, it is competent for her to maintain an action for the recovery thereof, in her own name. 3
3. Without any reference to the question whether the plaintiff in such an action is, under the circumstances, entitled to the services of her son, as her child and servant, the fact that she is assignee of the claim, is enough to enable her to maintain the action in her own name and right. 3

I

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

See GUARDIAN.

INJUNCTION.

See ATTACHMENT, 2.

INJURIES TO PROPERTY.

See COMPLAINT, 3.

INSURANCE, (LIFE.)

Where a New York life insurance company, at the commencement of the late civil war, had an agent, residing at Mobile, in the State of Alabama, to whom a person insured had been in the habit of paying the premiums, for several years; *Held* that the war did not suspend the agency, and that the payment of a premium to such agent, during the war, was binding upon the company, and had the effect to continue the policy in force. *Bonds v. The New York Life Ins. Co.* 556

INTEREST.

Interest can be charged upon an account only from the time the account is rendered. It is not allowable upon the various items thereof from date. *Wood v. Belden*, 549

J

JOINDER OF CAUSES OF ACTION.

See COMPLAINT, 1.

JOINT OWNERS.

See EVIDENCE, 2, 3.

JUDGES.

See CONSTITUTIONAL LAW.

JUDGMENT.

1. Although, under the Code, the time to answer expires by its own limitation, without the entry of a rule for default, yet the mere lapse of twenty days from the service of the summons is not the obtaining of a judgment. *Livingston v. Rendall*, 493
2. Where a judgment was recovered against the defendant after his death,

every step in the cause—except the service of the summons three years before—having been taken after the defendant was dead, the judgment was set aside on motion, by his administrator. *ib*

3. The former practice, under the Revised Statutes, of making a suggestion upon the record, of the death of the defendant before judgment was obtained, is practically inapplicable, under the Code. *ib*

4. There is no sense in which judgments are now entered as of any term; and there is no reason why a judgment by default, obtained in vacation, should relate back to the first day of the last preceding term. *ib*

See ATTORNEY.
CORPORATION, 4, 5.
PRACTICE, 10 to 18.

JUDGMENT ROLL.

See EVIDENCE, 10.

JURISDICTION.

See HIGHWAYS, 1, 2, 5.

JUSTICES' COURTS.

See PLEADING.

L

LANDLORD AND TENANT.

1. As between landlord and tenant, the law is well settled, when there is no fraud or false representations, or deceit, and in the absence of an express warranty or covenant to repair, that there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use. *O'Brien v. Capwell*, 497

2. The principle of *caveat emptor* applies to all contracts for the letting of property, real, personal or mixed,

as much as to contracts of sale, with one or two recognized exceptions. *ib*

3. Where there is no covenant on the part of a lessor to repair the buildings upon the demised premises, he is not liable to respond in damages to a servant of the tenant, for injuries sustained by reason of a want of repairs. *ib*

4. When a lessor is under no obligation to repair the premises, and their condition is equally as well known to the tenant as to him, there is no basis for an action against him, for negligence, by the tenant or any servant of his, or person standing in his place, arising from the fact that the premises were out of repair. *ib*

See NEGLIGENCE.

LETTERS OF CREDIT.

1. The defendant, by a letter of credit dated at Bremen, addressed to the plaintiffs at New York, opened an account with the latter in favor of R. & Co., of New Orleans, for \$50,000, to be used by sixty days' sight drafts; adding: "This credit is intended for advances to be made on consignments of merchandise to my address, and you will please to keep the same in force for the coming year, 1860. It is, however, not required that bills of lading accompany the advice of the drafts." *Held* that the general authority first conferred by this letter was not restricted by the subsequent clause. That the latter clause did not make it the duty of the plaintiffs to see, before they accepted drafts drawn by R. & Co. which were apparently within the terms of the authority, that they were drawn against consignments made to the defendant's address. *Gelpcke v. Quentell*, 250

2. *Held*, also, that the clause, "it is, however, not required that bills of lading should accompany the advice of the drafts," should be construed as dispensing with the necessity of the bills of lading accompanying the drafts themselves. *ib*

3. Instruments of that character should be construed as the parties to whom

they are addressed may fairly and reasonably be expected to understand them. *ib*

LIMITATIONS, STATUTE OF.

On the 23d of November, 1850, the plaintiff sold to the firm of M. & H. certain property for \$20,500, payable, \$5000 in cash, \$5500 in the note of M. & H. and \$10,000 in the draft of M. & H., on S. & Co., at three months. The purchase was made for the benefit of M. & H. alone, and the draft was accepted by S. & Co., (of which firm M. was a member,) for the accommodation of the plaintiff. In December, 1850, the plaintiff placed the acceptance in the hands of A. & Co., as his agents, and as security for advances made to him, and informed M., before it matured, that A. & Co. had the same for collection, with full power to settle with them. In May, 1851, S. & Co. became insolvent, and in October, 1851, the firm was dissolved. In August, 1852, A. & Co. accepted the individual notes of M. for \$4000 in full for said acceptance, which notes were paid to A. & Co., and the acceptance delivered to M. Subsequently, A. & Co. rendered an account of said settlement, to the plaintiff, and paid him the balance due to him, informing him that they had delivered the acceptance to S. or to M. On the 27th of October, 1851, when the firm of S. & Co. was dissolved, M. assumed all the debts and liabilities of the firm, and gave to S. a bond to indemnify him against the same. In an action commenced by the plaintiff March 20, 1856, against the defendant, to recover the balance of an account stated, of the amount remaining due upon the acceptance; it was *Held*, 1. That the plea of the statute of limitations was a good defense; and this, whether the amendment of 1867 was applicable, or not. 2. That the payment of the \$4000, in August, 1852, was not a *novation* of the contract, so far as S. was concerned, so as to make the statute commence running only from that time. 3. That the payment of \$4000 having been made by M. after the dissolution of the firm of S. & Co., and there being no evidence that S. had anything to do with it, or authorized it, he

was not bound or affected by such payment. 4. That whether such payment was made before or after the action was barred by the statute of limitations made no difference. That in neither case did the payment affect the running of the statute, as to the partner who did not make or authorize it. *Graham v. Salover*, 818

M

MAP.

See DEED.

MARRIED WOMEN.

Where, upon the face of a note, made by a married woman, and by its express terms, the maker charges her separate estate, the case of *The Corn Exchange Ins. Co. v. Babcock*, (42 N. Y. App. 613,) is conclusive authority against her, in an action upon the note. *Merchants' Bank v. Scott*, 641

See HUSBAND AND WIFE.

PROMISSORY NOTES, 14, 15, 16.

MEMORANDUM.

See ASSIGNMENT.

MORTGAGE.

1. An assignee of a mortgage is a purchaser, and if a *bona fide* purchaser, is not chargeable with his assignor's notice of incumbrances upon, or estates in, the mortgaged premises. *Trustees of Union College v. Wheeler*, 585
2. Where, prior to January 1, 1830, the purchase money of land was paid equally by A., S. and N., but a deed of the whole was taken by A. alone, who, after that date, conveyed an undivided two-thirds to S., and the premises were subsequently, by A. and S., contracted to be sold in parcels to various parties under whom the defendants claimed, and who paid portions of the purchase money to A. and S.; and before

deeds were given, N. quit-claimed to S. his interest in the premises and took back from S. a mortgage, which was subsequently assigned by N. to the plaintiff, who had no notice of the contracts, and paid value; *Held*, on foreclosure, 1. That a trust resulted to N. in one-third of the land. 2. That the trust was not divested by the conveyance to S. though subsequent to the Revised Statutes, but remained a valid charge upon the land, in S.'s hands. 3. That S. acted as N.'s *agent*, in giving the contracts, and that N. was chargeable with notice of the contracts, as the acts of his agent; which notice was effective in the transaction of the mortgage. 4. That the mortgage, in N.'s hands, was therefore no lien upon the land, as against the contract purchasers. *ib*

3. *Held, also*, that the plaintiff, being a *bona fide* purchaser, was not chargeable with the notice N. had; and that the mortgage in the hands of the plaintiff was therefore a valid lien upon the land of those of the contract purchasers whose possession did not amount to constructive notice of their rights. *ib*

4. The plaintiff, being vested with the absolute title to certain premises, the purchase money of which had been paid by S., executed a mortgage upon the same, for a valuable consideration, to C., who had no notice, or knowledge, to put him upon inquiry as to the existence of any trust. *Held* that such mortgage was a valid and subsisting lien upon the mortgaged premises, as against any interest of S. therein. And a judgment dismissing a complaint filed by the plaintiff to enjoin the foreclosure of such mortgage was affirmed. *Brown v. Cherry*, 628

5. In an action of ejectment, it was proved that, in June, 1867, the legal title to the premises was in F., to whom they had been conveyed by W., in August, 1866, although he (F.) had executed a deed of the same, in October, 1866, with the name of the grantee in blank, which he had delivered to D. for his (D.'s) wife. The premises were subject to a mortgage for \$3200, given by F. to W., and by W. assigned to the plaintiff. In June, 1867, D. applied

to the plaintiff for a loan of \$1500, offering \$150 for the use of it for three or four months. The plaintiff refused the application. It was finally agreed that he should *buy* the property, and should agree with Mrs. D. to sell it to her, in case she should pay within three months. Accordingly, the plaintiff's name was inserted in the blank, as grantee in said deed, and F. re-acknowledged the deed, and the same was delivered to the plaintiff, who gave his check for \$1500. The same day an agreement was executed by the plaintiff and Mrs. D., by which the former agreed to sell, and the latter agreed to buy the property for the price of \$5650, \$1650 in cash on the 24th of October, 1867, and \$3200 by bond and mortgage; and that in case she should fail to comply with the terms of sale, on the day specified, the agreement should "be null and void." *Held* 1. That the conclusion of the referee, that the plaintiff was a mortgagee, and therefore could not maintain ejectment, was erroneous. 2. That the plaintiff was something more than a mortgagee; that he was a trustee, at least of the title, substituted in the place of F., with the rights of a purchaser, to the extent of his mortgage of \$3200 and the \$1500 advanced by him. 3. That at most the defendant had a right of redemption, or a right under the contract, to a conveyance on complying with the terms of the agreement for a repurchase and re-sale. 4. That the agreement to pay, and to receive, \$150 over and above the actual amount of the mortgage and the money advanced, did not necessarily make the transaction usurious. 5. That considering that the plaintiff had the legal title to the premises, it was erroneous for the referee to dismiss the complaint. 6. That *time* not being of the essence of the contract, the defendant might be relieved from the default in not making payment according to the terms of said contract. 7. That the court, under section 380 of the Code, had the right to reverse, affirm or modify the judgment, as it might deem proper, and render such judgment as the referee ought to have rendered upon the clear, undisputed facts of the case. 8. That upon the finding of the referee that the plaintiff's title was in the nature of a

mortgage, or conditional deed, for money loaned, he should have allowed the defendants (D. and wife) to redeem such mortgage, according to their prayer for alternative relief, and rendered judgment accordingly. *Fiedler v. Darrin*, 651

See DEED, 5.

N

NEGLIGENCE.

1. The owner of a steamer engaged in towing boats on a lake and river is not responsible for an injury to one of the boats, while in tow of the steamer, without proof of actual negligence, or want of ordinary care and skill. *Taft v. Carter*, 67
2. Where the navigation was dangerous, and experienced men differed as to the comparative safety of two plans proposed for making up a tow, in order to pass it safely between the piers of a bridge on the river; *Held* that the owner of the steamer towing it was not to be deemed guilty of negligence, or want of ordinary care or skill, although the jury should believe, upon the evidence, that the captain omitted to adopt the safest plan. It was at most an error of judgment. *ib*
3. In cases of negligence consisting of mere omission of duty, where no affirmative fault, misfeasance or affirmative wrong was committed by the defendant, or is imputed to him, it is essential, to sustain a recovery, to establish that the defendant owed some clear, specific legal duty to the party injured, which was violated. *O'Brien v. Copwell*, 497

See LANDLORD AND TENANT.
RAILROAD COMPANIES, 8, 4, 5.

NEW TRIAL.

See PRACTICE, 10, 11,

NEW YORK (CITY OF.)

1. Where commissioners appointed under the act of 1818, (1 R. L. 418,

§ 178,) to estimate the damages sustained by land owners by reason of the extension of a street in the city of New York, report that a portion of a lot will be required, for the improvement, and award to the owner a specified sum, in consideration of his relinquishing the said piece of land, with the improvements thereon, for the purpose of such extension, and of his removing the building from the lot; allowing the owner to retain the materials of which the building consists, as part compensation for the damage sustained by him; and such report is confirmed, on the application of the city corporation; the confirmation of the report is binding and conclusive upon the corporation, as well in respect to the materials, as in respect to the other portions. Per *INGRAHAM, P. J. Schuchardt v. The Mayor &c. of New York*, 295

2. If the awarding of the materials to the owner of the lot is objectionable to the city corporation, they should make the objection before the confirmation of the report. They cannot do so after it has been confirmed. And if they convert such materials to their own use, they are liable to the owner. Per *INGRAHAM, P. J.* *ib*
3. The act of the legislature, of April 26, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881*), does not apply to cases which had arisen prior to the passage of that act, although argued, at special term, subsequently to its passage. *Matter of Rensselaer*, 817
4. The statute of 1870 (*ch. 883*) is applicable to assessments made prior to its passage, and is not unconstitutional. *Matter of Tracy*, 525
5. Where an application is made, since that statute, to vacate an assessment made previous to its enactment, it must be governed by the law as it now stands; and if it appears upon the hearing, that by reason of irregularities, the expense of the improvement has been unlawfully increased, the court should not vacate the assessment, but direct that it be reduced by the amount of the unlawful increase of expense included

therein, to be ascertained and calculated in the manner pointed out in the statute. (§ 27.) *ib*

NOTICE.

See MORTGAGE, 1, 2.
POSSESSION.

NOVATION.

See LIMITATIONS, STATUTE OF.

O

OFFICE AND OFFICERS.

See CONSTITUTIONAL LAW.

P

PARTIES.

See PRACTICE, 1.

PARTNERSHIP.

1. An incoming partner, who becomes a member of the firm after a contract has been made by it with an individual, for work and labor to be done by him as superintendent, and performance has been commenced under it, is liable to the employee for the work and labor performed by the latter after such new partner becomes a member of the firm, and is elected and takes upon himself the duties of its chief managing and executive officer. *Fuller v. Rowe*, 844
2. If the company is dissolved, and abandons its work, before the period for which the employee was hired expires, this gives the latter the right to bring his action for work and labor, the same as though no special contract had ever been made. *ib*
3. But he cannot be made liable for that portion of the indebtedness which accrued before he came into the firm, except by his own act or agreement founded upon a sufficient consideration. *ib*

4. Merely becoming a member of the firm is not sufficient, and raises no legal presumption against him. His promise or agreement, to pay previous debts of the firm, cannot be inferred from that circumstance alone. *ib*

5. The question, in such a case, is whether the incoming partner has assumed the old indebtedness. And this is a question of fact, or a mixed question of fact and of law, but not of law merely. If the referee fails to find that fact, no recovery can be had. *ib*

See AGREEMENT, 1.
LIMITATIONS, STATUTE OF.

PAYMENT.

See ASSESSMENT AND ASSESSORS, 1, 2.
LIMITATIONS, STATUTE OF.

PERJURY.

See CRIMINAL LAW.

PLEADING.

Greater latitude of construction is always allowable in regard to pleadings in actions commenced in justices' courts than in actions commenced in courts of record. *Osborn v. Nelson*, 876

See ANSWER.
COMPLAINT.

POSSESSION.

1. Though possession of land is notice to all the world of the possessor's interest, the definition of the word possession is restricted to an actual, open, visible occupancy, accompanied by improvement of the premises. *Trustees of Union College v. Wheeler*, 585
2. Fencing, pasturing, cutting and selling timber, and clearing part of the premises, do not constitute such possession. *ib*

See EVIDENCE, 2.

POWERS IN TRUST.

A testator devised his lands to his widow for life, with remainder to his nephew, W. S. V., his heirs and assigns forever. His widow afterwards married A. S., and W. S. V. thereupon conveyed his remainder, in trust, to F. S. for the sole use and benefit of A. S. during his natural life, in case he survived his wife; and directed in case of her sickness or inability, and more than the use of the lands should be required for her support, that F. S. might sell portions of such lands, sufficient to support and maintain her; and after her and her husband's death, the said lands, or such parts thereof as should then remain unsold, to the heirs of W. S. V. and F. S. in equal parts, one moiety thereof to the heirs of each; or in the same proportion to their children, if the parents should then be living. *Held*, 1. That the trusts were valid, and the deed effectual to dispose of the estate in remainder. 2. That if A. S. survived his wife it would operate to create a valid trust in F. S. to receive the rents and profits of the lands and pay them over to A. S. during his life. 3. That the authority conferred upon F. S. to dispose of portions of the lands for the support and maintenance of the wife of A. S. in case of her need, was a general power in trust, and the remainder in fee, being limited upon the two lives in being of A. S. and wife, was effectually granted to the children or heirs, as the case might be, of W. S. V. and F. S., subject only to the execution of the power. *King v. Whaley*, 71

PRACTICE.

1. No person is allowed to defend an action upon a question which does not concern him, and in which he has no lawful interest. *Flint v. Craig*, 819
2. Before this court will reverse an order of a county court granting a new trial on a case and exceptions, it must be made clearly to appear that the court below has committed some error of law. *Osborn v. Nelson*, 875

3. Where a certificate of stock was assigned by the plaintiff to the defendant, to be held and applied not only in liquidation of an indebtedness of the plaintiff, but of all future advances which the defendant might make; and further advances were made, by the defendant, by the payment of calls on the certificate; *Held*, in an action to redeem the certificate, that as an account would have to be taken of such advances, and also of the payments made by the plaintiff, and such account was necessary to be taken before judgment, this made the case referable. *Ludlow v. The American Exchange National Bank*, 509

4. If a case is referable, the discretion of the judge ordering a reference will not be reviewed on appeal. *ib*

5. In an action to recover a balance of an account for carriages sold to the defendant, repairs, &c., in which account the defendant is credited with the proceeds of the sale of a landau left with the plaintiff by the defendant for sale on his account, the defendant, under an answer containing a general denial, may prove any claim which he may have against the plaintiff for selling the landau contrary to orders limiting the price. *Wood v. Belden*, 549

6. Hence it is erroneous to charge the jury that the items relating to the landau are withdrawn from their consideration, except as to the price agreed to be paid for it, and for repairs. *ib*

7. Although a charge to the jury is erroneous, yet it will not authorize a reversal of the judgment, if it can by no possibility have prejudiced the unsuccessful party. *Tift v. Moor*, 619

8. If the error be one which did not, and could not, affect the judgment, it is no cause for reversal. *ib*

9. The objection that no such cause of action as that upon which the recovery was had is stated in the complaint, if not taken at the trial, is not available on appeal, even though material. *ib*

10. A motion for a new trial, on a case and exceptions, after final judgment

has been rendered without appealing from the judgment, has not been provided for by the Code, and is entirely inconsistent with the whole plan and scheme of practice as therein prescribed. *Merchants' Bank v. Scott*, 641

11. The general term has no right to hear a mere motion for a new trial, on exceptions, where judgment has been already rendered and no appeal taken. *ib*

12. If judgment has been irregularly or improperly entered contrary to the order at the trial, the unsuccessful party should make his motion to have it set aside, before bringing his motion on the exceptions to argument. Otherwise he cannot appeal from the judgment. *ib*

18. The only practice known to the Code, when judgment has been rendered by the special term, is to review it on appeal on case and exceptions, or upon the record, if no case is made. *ib*

**See ASSESSMENT AND ASSESSORS.
JUDGMENT.
MORTGAGE, 5.**

PROMISSORY NOTES.

1. Where a note is given payable "to the order of" certain persons named, and after its delivery by the makers, the holders, without the knowledge or consent of the makers, erase the words "to the order of," and insert the words "or bearer," this is an alteration which does not change or affect the liability of the makers; and unless it can be seen that their liability may possibly be affected prejudicially, by the alteration, it does not vitiate and destroy the note; *it seems. Flint v. Craig*, 819

2. Even assuming that such an alteration was in fact made, and is material, still it is not necessarily a forgery; that depending upon the intention with which the alteration was made. A fraudulent or felonious intention is not to be presumed, but is to be proved. *ib*

3. Although an alteration, in a promissory note, be material, so that the

makers might, if they should so elect, avoid payment, upon the ground of the unauthorized alteration, yet as they might, upon inquiring into the facts and circumstances, ratify the alteration, and thus render the note perfectly valid; or consent to pay it without regard to such alteration; and as it would be but just that they should do so, the law will infer that they would. *ib*

4. But this is a question which concerns the makers, alone. A third person who is not a party to the note, nor in privity with any one who is a party, has no interest in the question, nor right to assume that the makers will refuse to pay, on account of the alteration. *ib*

5. A person to whom a promissory note, made by another, has been turned out, by the holders, as collateral security for the payment of a loan, and who, on demand of the note, after payment of the loan, refuses to redeliver it, cannot, in an action by such holders, to recover for the wrongful conversion of the note, set up the defense that a material alteration has been made, in it, since it was executed; either as a bar to the action, or to mitigate the damages. *ib*

6. The whole matter and subject of the alteration of the note is, as between the parties to such action, wholly irrelevant and immaterial, for any purpose. *ib*

7. The defendant is to be deemed and taken as having no interest in the note, any more than one would have who had obtained possession of the property of another, by any tort or larceny. He is neither lawful owner nor lawful holder. His possession is without right, and by means tortious, and through a breach of trust. *ib*

8. An indorser's engagement is a conditional one, to be made absolute upon the observance of such formula as are prescribed by law; unless waived, or rendered unnecessary by facts and circumstances attending the maturity, demand and refusal of payment, recognized by commercial law. *Harden v. Boyce*, 425

2. *It seems* where one of several owners enters into the actual possession of land under a deed which purports to convey the entire interest, it will not be presumed, without other evidence, that his possession is hostile to the remaining owners. *ib*
 3. The declarations of the tenant, in such a case, though perhaps unnecessary, are competent evidence to restrict his claim and show that it is not adverse. *ib*
 4. In an action for goods sold and delivered, and to recover the balance of an account, day-books and books of original entries, not kept by the plaintiffs themselves, but by book keepers employed for that purpose, and who did not make the sales charged by them, but only entered the sales reported to them by the salesmen, are not admissible in evidence for the purpose of proving the entries of sales, on proof of handwriting; which sales are not remembered by the persons making the same; and where the sale has not been proven, apart from the book. *Gould v. Conway*, 855
 5. Such books, as books of account, are incompetent witnesses for any purpose. Of themselves they can neither prove, nor tend to prove, anything. The entries being all made by third persons, are mere written statements of others—no better than hearsay. *ib*
 - 6 Nor can such entries be properly received in evidence as original memoranda, to aid in establishing the defendant's indebtedness. *ib*
 7. Yet it seems, that in such a case, if it appears that the salesman who reported a sale saw the charge made by the book-keeper, and knew, then, that it was correctly made, it may be introduced as a memorandum, in connection with the testimony of the salesman, either with or without the testimony of the book-keeper, the salesman having forgotten the fact that such sale was made by him. *ib*
 8. There is no case, or rule of evidence, which holds that the books of account of a party are proper evidence to prove an indebtedness against another, where such books have not been kept by a clerk employed by him. *Per JOHNSON, J. ib*
 9. When issues are formed, by the pleadings, testimony pertinent to such issues is admissible. Hence, if the plaintiff, in addition to the matters set forth in the complaint, testifies, upon a commission, as to matters not embraced in the complaint, but distinctly raised and presented as a defense by the answer, it cannot be held as error to admit the testimony. *Miller v. White*, 434
 10. Defendants objected, on the trial, to the introduction of a judgment roll in evidence, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The answers, which were a part of the judgment roll, showed that the defendants had been brought into court. *Held* that if the clerk of the court omitted to annex the summons to the judgment roll, as it was his duty to do, the omission would not deprive the prevailing party of his rights. And that with respect to the minutes of trial, inasmuch as the judgment roll showed a trial before the judge, without a jury, his findings in favor of the plaintiff, and directions for judgment, it appeared to meet the requirements of the Code, (§ 281;) except in respect to the summons. *ib*
 11. And that as to its sufficiency, or the effect of any irregularity, the judgment roll was not a nullity. *ib*
- See* CONTEMPT, 4.
CORPORATION, 3.
PRACTICE, 5.
SUPPLEMENTARY PROCEEDINGS.
- ### EXECUTORS AND ADMINISTRATORS.
1. A trustee, making a sale of the trust property, cannot become a purchaser on his own account, either directly or through the agency of another. *Terwilliger v. Brown*, 9
 2. Thus, if an executor, selling property under the order of the surrogate, for the payment of debts, becomes himself interested in a purchase thereof made by one employed by him to act as auctioneer, and

who thus becomes his sub-agent, a residuary devisee may come into a court of equity, and set aside the sale, and have the property resold. *ib*

3. Upon a sale of lands by an executor, under the order of the surrogate, for the payment of debts, B., officiating as auctioneer, struck off the premises to himself. Before the confirmation of the sale, the payment of the purchase money, or the delivery of the deed to B., an arrangement was made between him and the executor, by which the latter became equally interested with the former in the purchase of the property. The sale was subsequently confirmed by the surrogate, and a conveyance of the premises executed by the executor to B., who, on the same day, conveyed an equal undivided half of said premises to the executor. *Held* that neither B. nor the executor could be protected against the claims of those interested in the estate directed to be sold; the purchase being a palpable violation of the statute, and in direct hostility to the well established principle, that a trustee shall not be allowed, directly or indirectly, to speculate out of the trust property, or to become a purchaser thereof for his own benefit. *ib*

F

FORGED DRAFT.

See BILLS OF EXCHANGE.

FRAUD.

See COMPLAINT.

FRAUDS, STATUTE OF

See AGREEMENT, 5.

G

GUARDIAN.

1. Where real estate belonging to infants is sold by order of the county court, and a bond and mortgage

given to the special guardian (who is also general guardian) of the infants, to secure the payment of a part of the purchase money, he has power to sell and assign such bond and mortgage, and can, by such sale and assignment, give the purchaser a perfect title thereto. *Tuttle v. Heavy*, 884

2. No order, from any court, is necessary to enable a guardian to make such an assignment, or to establish its validity. *ib*

H

HIGHWAYS.

1. An application, under the highway act of 1847, (*Laws of 1847, ch. 455*), by land owners, over whose land a highway has been laid, for a re-assessment of damages by a jury, is not an *appeal*, in any sense; but is like a motion for a re-argument of the same matter before another tribunal. It is a continuation of the same proceeding, not before a higher, but a different, forum or body; and one is in nowise a review of the other. *The People ex rel. Lewis v. White*, 666
2. It is no objection to such an application, or to the jurisdiction of the justice issuing the venire, that the application for a jury is made by several land owners, together, instead of separately. *ib*
3. Although each person injured may doubtless apply alone, yet as the same jury that is drawn to re-assess the damages upon the first application must re-assess for every other person aggrieved, upon the same highway, separate applications would seem to be superfluous. *Per* PORTER, J. *ib*
4. The question of *costs* creates no obstacle to a joint application; as the statute is broad enough to cover all questions that may arise, on that point. *ib*
5. In the absence of any positive directions in the statute, as to the manner of proceeding, and in the absence

of any adjudicated case, to show error, it is safer for the court, in such a case, to hold the established rule that where a statute confers power and jurisdiction to act, in a matter, but omits to prescribe the form of proceeding, the courts will hold that all necessary powers to carry out the provisions of the act are also granted. *ib*

HUSBAND AND WIFE.

1. Where a husband abandons his wife and family, ceases to provide them, and, so far as he can, renounces his marital relations, and goes to California, where he has ever since remained, this is equivalent to abjuring the realm, by a husband, at common law; so as to enable the wife to sue and be sued as a *feme sole*. *Osborn v. Nelson*, 375
2. A claim for the services of her infant son, which has been assigned to her, is the separate estate of the wife, in such a case; and under our statutes for the better protection of the rights of married women, it is competent for her to maintain an action for the recovery thereof, in her own name. *ib*
3. Without any reference to the question whether the plaintiff in such an action is, under the circumstances, entitled to the services of her son, as her child and servant, the fact that she is assignee of the claim, is enough to enable her to maintain the action in her own name and right. *ib*

I

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

See GUARDIAN.

INJUNCTION.

See ATTACHMENT, 2.

INJURIES TO PROPERTY.

See COMPLAINT, 3.

INSURANCE, (LIFE.)

Where a New York life insurance company, at the commencement of the late civil war, had an agent, residing at Mobile, in the State of Alabama, to whom a person insured had been in the habit of paying the premiums, for several years; *Held* that the war did not suspend the agency, and that the payment of a premium to such agent, during the war, was binding upon the company, and had the effect to continue the policy in force. *Sands v. The New York Life Ins. Co.* 558

INTEREST.

Interest can be charged upon an account only from the time the account is rendered. It is not allowable upon the various items thereof from date. *Wood v. Belden*, 549

J

JOINDER OF CAUSES OF ACTION.

See COMPLAINT, 1.

JOINT OWNERS.

See EVIDENCE, 2, 3.

JUDGES.

See CONSTITUTIONAL LAW.

JUDGMENT.

1. Although, under the Code, the time to answer expires by its own limitation, without the entry of a rule for default, yet the mere lapse of twenty days from the service of the summons is not the obtaining of a judgment. *Livingston v. Rendall*, 498
2. Where a judgment was recovered against the defendant after his death,

every step in the cause—except the service of the summons three years before—having been taken after the defendant was dead, the judgment was set aside on motion, by his administrator. *ib*

8. The former practice, under the Revised Statutes, of making a suggestion upon the record, of the death of the defendant before judgment was obtained, is practically inapplicable, under the Code. *ib*
4. There is no sense in which judgments are now entered as of any term; and there is no reason why a judgment by default, obtained in vacation, should relate back to the first day of the last preceding term. *ib*

See ATTORNEY.
CORPORATION, 4, 5.
PRACTICE, 10 to 13.

JUDGMENT ROLL.

See EVIDENCE, 10.

JURISDICTION.

See HIGHWAYS, 1, 2, 5.

JUSTICES' COURTS.

See PLEADING.

L

LANDLORD AND TENANT.

1. As between landlord and tenant, the law is well settled, when there is no fraud or false representations, or deceit, and in the absence of an express warranty or covenant to repair, that there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use. *O'Brien v. Capwell*, 497
2. The principle of *caveat emptor* applies to all contracts for the letting of property, real, personal or mixed,

as much as to contracts of sale, with one or two recognized exceptions. *ib*

8. Where there is no covenant on the part of a lessor to repair the buildings upon the demised premises, he is not liable to respond in damages to a servant of the tenant, for injuries sustained by reason of a want of repairs. *ib*
4. When a lessor is under no obligation to repair the premises, and their condition is equally as well known to the tenant as to him, there is no basis for an action against him, for negligence, by the tenant or any servant of his, or person standing in his place, arising from the fact that the premises were out of repair. *ib*

See NEGLIGENCE.

LETTERS OF CREDIT.

1. The defendant, by a letter of credit dated at Bremen, addressed to the plaintiffs at New York, opened an account with the latter in favor of R. & Co., of New Orleans, for \$50,000, to be used by sixty days' sight drafts; adding: "This credit is intended for advances to be made on consignments of merchandise to my address, and you will please to keep the same in force for the coming year, 1860. It is, however, not required that bills of lading accompany the advice of the drafts." *Held* that the general authority first conferred by this letter was not restricted by the subsequent clause. That the latter clause did not make it the duty of the plaintiffs to see, before they accepted drafts drawn by R. & Co. which were apparently within the terms of the authority, that they were drawn against consignments made to the defendant's address. *Gelpcke v. Quentell*, 250
2. *Held*, also, that the clause, "it is, however, not required that bills of lading should accompany the advice of the drafts," should be construed as dispensing with the necessity of the bills of lading accompanying the drafts themselves. *ib*
8. Instruments of that character should be construed as the parties to whom

they are addressed may fairly and reasonably be expected to understand them. *ib*

LIMITATIONS, STATUTE OF.

On the 23d of November, 1850, the plaintiff sold to the firm of M. & H. certain property for \$20,500, payable, \$5000 in cash, \$5500 in the note of M. & H. and \$10,000 in the draft of M. & H., on S. & Co., at three months. The purchase was made for the benefit of M. & H. alone, and the draft was accepted by S. & Co., (of which firm M. was a member,) for the accommodation of the plaintiff. In December, 1850, the plaintiff placed the acceptance in the hands of A. & Co., as his agents, and as security for advances made to him, and informed M., before it matured, that A. & Co. had the same for collection, with full power to settle with them. In May, 1851, S. & Co. became insolvent, and in October, 1851, the firm was dissolved. In August, 1852, A. & Co. accepted the individual notes of M. for \$4000 in full for said acceptance, which notes were paid to A. & Co., and the acceptance delivered to M. Subsequently, A. & Co. rendered an account of said settlement, to the plaintiff, and paid him the balance due to him, informing him that they had delivered the acceptance to S. or to M. On the 27th of October, 1851, when the firm of S. & Co. was dissolved, M. assumed all the debts and liabilities of the firm, and gave to S. a bond to indemnify him against the same. In an action commenced by the plaintiff March 20, 1856, against the defendant, to recover the balance of an account stated, of the amount remaining due upon the acceptance; it was *Held*, 1. That the plea of the statute of limitations was a good defense; and this, whether the amendment of 1867 was applicable, or not. 2. That the payment of the \$4000, in August, 1852, was not a *novation* of the contract, so far as S. was concerned, so as to make the statute commence running only from that time. 3. That the payment of \$4000 having been made by M. after the dissolution of the firm of S. & Co., and there being no evidence that S. had anything to do with it, or authorized it, he

was not bound or affected by such payment. 4. That whether such payment was made before or after the action was barred by the statute of limitations made no difference. That in neither case did the payment affect the running of the statute, as to the partner who did not make or authorize it. *Graham v. Solover*, 813

M

MAP.

See DRED.

MARRIED WOMEN.

Where, upon the face of a note, made by a married woman, and by its express terms, the maker charges her separate estate, the case of *The Corn Exchange Ins. Co. v. Babcock*, (42 N. Y. App. 618,) is conclusive authority against her, in an action upon the note. *Merchants' Bank v. Scott*, 641

See HUSBAND AND WIFE.

PROMISSORY NOTES, 14, 15, 16.

MEMORANDUM.

See ASSIGNMENT.

MORTGAGE.

1. An assignee of a mortgage is a purchaser, and if a *bona fide* purchaser, is not chargeable with his assignor's notice of incumbrances upon, or estates in, the mortgaged premises. *Trustees of Union College v. Wheeler*, 585
2. Where, prior to January 1, 1880, the purchase money of land was paid equally by A., S. and N., but a deed of the whole was taken by A. alone, who, after that date, conveyed an undivided two-thirds to S., and the premises were subsequently, by A. and S., contracted to be sold in parcels to various parties under whom the defendants claimed, and who paid portions of the purchase money to A. and S.; and before

deeds were given, N. quit-claimed to S. his interest in the premises and took back from S. a mortgage, which was subsequently assigned by N. to the plaintiff, who had no notice of the contracts, and paid value; *Held*, on foreclosure, 1. That a trust resulted to N. in one-third of the land. 2. That the trust was not divested by the conveyance to S. though subsequent to the Revised Statutes, but remained a valid charge upon the land, in S.'s hands. 3. That S. acted as N.'s agent, in giving the contracts, and that N. was chargeable with notice of the contracts, as the acts of his agent; which notice was effective in the transaction of the mortgage. 4. That the mortgage, in N.'s hands, was therefore no lien upon the land, as against the contract purchasers. *ib*

3. *Held*, also, that the plaintiff, being a bona fide purchaser, was not chargeable with the notice N. had; and that the mortgage in the hands of the plaintiff was therefore a valid lien upon the land of those of the contract purchasers whose possession did not amount to constructive notice of their rights. *ib*

4. The plaintiff, being vested with the absolute title to certain premises, the purchase money of which had been paid by S., executed a mortgage upon the same, for a valuable consideration, to C., who had no notice, or knowledge, to put him upon inquiry as to the existence of any trust. *Held* that such mortgage was a valid and subsisting lien upon the mortgaged premises, as against any interest of S. therein. And a judgment dismissing a complaint filed by the plaintiff to enjoin the foreclosure of such mortgage was affirmed. *Brown v. Cherry*, 628

5. In an action of ejectment, it was proved that, in June, 1867, the legal title to the premises was in F., to whom they had been conveyed by W., in August, 1866, although he (F.) had executed a deed of the same, in October, 1866, with the name of the grantee in blank, which he had delivered to D. for his (D.'s) wife. The premises were subject to a mortgage for \$3200, given by F. to W., and by W. assigned to the plaintiff. In June, 1867, D. applied

to the plaintiff for a loan of \$1500, offering \$150 for the use of it for three or four months. The plaintiff refused the application. It was finally agreed that he should buy the property, and should agree with Mrs. D. to sell it to her, in case she should pay within three months. Accordingly, the plaintiff's name was inserted in the blank, as grantee in said deed, and F. re-acknowledged the deed, and the same was delivered to the plaintiff, who gave his check for \$1500. The same day an agreement was executed by the plaintiff and Mrs. D., by which the former agreed to sell, and the latter agreed to buy the property for the price of \$5650, \$1650 in cash on the 24th of October, 1867, and \$3200 by bond and mortgage; and that in case she should fail to comply with the terms of sale, on the day specified, the agreement should "be null and void." *Held* 1. That the conclusion of the referee, that the plaintiff was a mortgagee, and therefore could not maintain ejectment, was erroneous. 2. That the plaintiff was something more than a mortgagee; that he was a trustee, at least of the title, substituted in the place of F., with the rights of a purchaser, to the extent of his mortgage of \$3200 and the \$1500 advanced by him. 3. That at most the defendant had a right of redemption, or a right under the contract, to a conveyance on complying with the terms of the agreement for a repurchase and resale. 4. That the agreement to pay, and to receive, \$150 over and above the actual amount of the mortgage and the money advanced, did not necessarily make the transaction usurious. 5. That considering that the plaintiff had the legal title to the premises, it was erroneous for the referee to dismiss the complaint. 6. That time not being of the essence of the contract, the defendant might be relieved from the default in not making payment according to the terms of said contract. 7. That the court, under section 830 of the Code, had the right to reverse, affirm or modify the judgment, as it might deem proper, and render such judgment as the referee ought to have rendered upon the clear, undisputed facts of the case. 8. That upon the finding of the referee that the plaintiff's title was in the nature of a

mortgage, or conditional deed, for money loaned, he should have allowed the defendants (D. and wife) to redeem such mortgage, according to their prayer for alternative relief, and rendered judgment accordingly. *Fiedler v. Darrin*, 651

See DEED, 5.

N

NEGLIGENCE.

1. The owner of a steamer engaged in towing boats on a lake and river is not responsible for an injury to one of the boats, while in tow of the steamer, without proof of actual negligence, or want of ordinary care and skill. *Taft v. Carter*, 67
2. Where the navigation was dangerous, and experienced men differed as to the comparative safety of two plans proposed for making up a tow, in order to pass it safely between the piers of a bridge on the river; *Held* that the owner of the steamer towing it was not to be deemed guilty of negligence, or want of ordinary care or skill, although the jury should believe, upon the evidence, that the captain omitted to adopt the safest plan. It was at most an error of judgment. *ib*
3. In cases of negligence consisting of mere omission of duty, where no affirmative fault, misfeasance or affirmative wrong was committed by the defendant, or is imputed to him, it is essential, to sustain a recovery, to establish that the defendant owed some clear, specific legal duty to the party injured, which was violated. *O'Brien v. Capwell*, 497

See LANDLORD AND TENANT.

RAILROAD COMPANIES, 3, 4, 5.

NEW TRIAL.

See PRACTICE, 10, 11,

NEW YORK (CITY OF.)

1. Where commissioners appointed under the act of 1818, (1 R. L. 418,

§ 178,) to estimate the damages sustained by land owners by reason of the extension of a street in the city of New York, report that a portion of a lot will be required, for the improvement, and award to the owner a specified sum, in consideration of his relinquishing the said piece of land, with the improvements thereon, for the purpose of such extension, and of his removing the building from the lot; allowing the owner to retain the materials of which the building consists, as part compensation for the damage sustained by him; and such report is confirmed, on the application of the city corporation; the confirmation of the report is binding and conclusive upon the corporation, as well in respect to the materials, as in respect to the other portions. Per *INGRAM, P. J. Schuchardt v. The Mayor &c. of New York*, 295

2. If the awarding of the materials to the owner of the lot is objectionable to the city corporation, they should make the objection before the confirmation of the report. They cannot do so after it has been confirmed. And if they convert such materials to their own use, they are liable to the owner. Per *INGRAM, P. J.* *ib*
3. The act of the legislature, of April 26, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881*.) does not apply to cases which had arisen prior to the passage of that act, although argued, at special term, subsequently to its passage. *Matter of Remsen*, 817
4. The statute of 1870 (*ch. 383*) is applicable to assessments made prior to its passage, and is not unconstitutional. *Matter of Treacy*, 525
5. Where an application is made, since that statute, to vacate an assessment made previous to its enactment, it must be governed by the law as it now stands; and if it appears upon the hearing, that by reason of irregularities, the expense of the improvement has been unlawfully increased, the court should not vacate the assessment, but direct that it be reduced by the amount of the unlawful increase of expense included

therein, to be ascertained and calculated in the manner pointed out in the statute. (§ 27.) *ib*

NOTICE.

See MORTGAGE, 1, 2.
POSSESSION.

NOVATION.

See LIMITATIONS, STATUTE OF.

O

OFFICE AND OFFICERS.

See CONSTITUTIONAL LAW.

P

PARTIES.

See PRACTICE, 1.

PARTNERSHIP.

1. An incoming partner, who becomes a member of the firm after a contract has been made by it with an individual, for work and labor to be done by him as superintendent, and performance has been commenced under it, is liable to the employee for the work and labor performed by the latter after such new partner becomes a member of the firm, and is elected and takes upon himself the duties of its chief managing and executive officer. *Fuller v. Rowe, 844*

2. If the company is dissolved, and abandons its work, before the period for which the employee was hired expires, this gives the latter the right to bring his action for work and labor, the same as though no special contract had ever been made. *ib*

3. But he cannot be made liable for that portion of the indebtedness which accrued before he came into the firm, except by his own act or agreement founded upon a sufficient consideration. *ib*

4. Merely becoming a member of the firm is not sufficient, and raises no legal presumption against him. His promise or agreement, to pay previous debts of the firm, cannot be inferred from that circumstance alone. *ib*

5. The question, in such a case, is whether the incoming partner has assumed the old indebtedness. And this is a question of fact, or a mixed question of fact and of law, but not of law merely. If the referee fails to find that fact, no recovery can be had. *ib*

See AGREEMENT, 1.
LIMITATIONS, STATUTE OF.

PAYMENT.

See ASSESSMENT AND ASSESSORS, 1, 2.
LIMITATIONS, STATUTE OF.

PERJURY.

See CRIMINAL LAW.

PLEADING.

Greater latitude of construction is always allowable in regard to pleadings in actions commenced in justices' courts than in actions commenced in courts of record. *Osborn v. Nelson, 875*

See ANSWER.
COMPLAINT.

POSSESSION.

1. Though possession of land is notice to all the world of the possessor's interest, the definition of the word possession is restricted to an actual, open, visible occupancy, accompanied by improvement of the premises. *Trustees of Union College v. Wheeler, 585*

2. Fencing, pasturing, cutting and selling timber, and clearing part of the premises, do not constitute such possession. *ib*

See EVIDENCE, 2.

POWERS IN TRUST.

A testator devised his lands to his widow for life, with remainder to his nephew, W. S. V., his heirs and assigns forever. His widow afterwards married A. S., and W. S. V. thereupon conveyed his remainder, in trust, to F. S. for the sole use and benefit of A. S. during his natural life, in case he survived his wife; and directed in case of her sickness or inability, and more than the use of the lands should be required for her support, that F. S. might sell portions of such lands, sufficient to support and maintain her; and after her and her husband's death, the said lands, or such parts thereof as should then remain unsold, to the heirs of W. S. V. and F. S. in equal parts, one moiety thereof to the heirs of each; or in the same proportion to their children, if the parents should then be living. *Held*, 1. That the trusts were valid, and the deed effectual to dispose of the estate in remainder. 2. That if A. S. survived his wife it would operate to create a valid trust in F. S. to receive the rents and profits of the lands and pay them over to A. S. during his life. 3. That the authority conferred upon F. S. to dispose of portions of the lands for the support and maintenance of the wife of A. S. in case of her need, was a *general power in trust*, and the remainder in fee, being limited upon the two lives in being of A. S. and wife, was effectually granted to the children or heirs, as the case might be, of W. S. V. and F. S., subject only to the execution of the power. *King v. Whaley*, 71

PRACTICE.

1. No person is allowed to defend an action upon a question which does not concern him, and in which he has no lawful interest. *Hunt v. Craig*, 819
2. Before this court will reverse an order of a county court granting a new trial on a case and exceptions, it must be made clearly to appear that the court below has committed some error of law. *Osborn v. Nelson*, 875

8. Where a certificate of stock was assigned by the plaintiff to the defendant, to be held and applied not only in liquidation of an indebtedness of the plaintiff, but of all future advances which the defendant might make; and further advances were made, by the defendant, by the payment of calls on the certificate; *Held*, in an action to redeem the certificate, that as an account would have to be taken of such advances, and also of the payments made by the plaintiff, and such account was necessary to be taken before judgment, this made the case *referable*. *Ludlow v. The American Exchange National Bank*, 509

4. If a case is referable, the discretion of the judge ordering a reference will not be reviewed on appeal. *ib*

5. In an action to recover a balance of an account for carriages sold to the defendant, repairs, &c., in which account the defendant is credited with the proceeds of the sale of a landau left with the plaintiff by the defendant for sale on his account, the defendant, under an answer containing a general denial, may prove any claim which he may have against the plaintiff for selling the landau contrary to orders limiting the price. *Wood v. Beiden*, 549

6. Hence it is erroneous to charge the jury that the items relating to the landau are withdrawn from their consideration, except as to the price agreed to be paid for it, and for repairs. *ib*

7. Although a charge to the jury is erroneous, yet it will not authorize a reversal of the judgment, if it can by no possibility have prejudiced the unsuccessful party. *Tyft v. Moor*, 619

8. If the error be one which did not, and could not, affect the judgment, it is no cause for reversal. *ib*

9. The objection that no such cause of action as that upon which the recovery was had is stated in the complaint, if not taken at the trial, is not available on appeal, even though material. *ib*

10. A motion for a new trial, on a case and exceptions, after final judgment

has been rendered without appealing from the judgment, has not been provided for by the Code, and is entirely inconsistent with the whole plan and scheme of practice as therein prescribed. *Merchants' Bank v. Scott*, 641

11. The general term has no right to hear a mere motion for a new trial, on exceptions, where judgment has been already rendered and no appeal taken. *ib*

12. If judgment has been irregularly or improperly entered contrary to the order at the trial, the unsuccessful party should make his motion to have it set aside, before bringing his motion on the exceptions to argument. Otherwise he cannot appeal from the judgment. *ib*

13. The only practice known to the Code, when judgment has been rendered by the special term, is to review it on appeal on case and exceptions, or upon the record, if no case is made. *ib*

See ASSESSMENT AND ASSESSORS.
JUDGMENT.
MORTGAGE, 5.

PROMISSORY NOTES.

1. Where a note is given payable "to the order of" certain persons named, and after its delivery by the makers, the holders, without the knowledge or consent of the makers, erase the words "to the order of," and insert the words "or bearer," this is an alteration which does not change or affect the liability of the makers; and unless it can be seen that their liability may possibly be affected prejudicially, by the alteration, it does not vitiate and destroy the note; *it seems. Flint v. Craig*, 819

2. Even assuming that such an alteration was in fact made, and is material, still it is not necessarily a forgery; that depending upon the intention with which the alteration was made. A fraudulent or felonious intention is not to be presumed, but is to be proved. *ib*

3. Although an alteration, in a promissory note, be material, so that the

makers might, if they should so elect, avoid payment, upon the ground of the unauthorized alteration, yet as they might, upon inquiring into the facts and circumstances, ratify the alteration, and thus render the note perfectly valid; or consent to pay it without regard to such alteration; and as it would be but just that they should do so, the law will infer that they would. *ib*

4. But this is a question which concerns the makers, alone. A third person who is not a party to the note, nor in privity with any one who is a party, has no interest in the question, nor right to assume that the makers will refuse to pay, on account of the alteration. *ib*

5. A person to whom a promissory note, made by another, has been turned out, by the holders, as collateral security for the payment of a loan, and who, on demand of the note, after payment of the loan, refuses to redeliver it, cannot, in an action by such holders, to recover for the wrongful conversion of the note, set up the defense that a material alteration has been made, in it, since it was executed; either as a bar to the action, or to mitigate the damages. *ib*

6. The whole matter and subject of the alteration of the note is, as between the parties to such action, wholly irrelevant and immaterial, for any purpose. *ib*

7. The defendant is to be deemed and taken as having no interest in the note, any more than one would have who had obtained possession of the property of another, by any tort or larceny. He is neither lawful owner nor lawful holder. His possession is without right, and by means tortious, and through a breach of trust. *ib*

8. An indorser's engagement is a conditional one, to be made absolute upon the observance of such formula as are prescribed by law; unless waived, or rendered unnecessary by facts and circumstances attending the maturity, demand and refusal of payment, recognized by commercial law. *Harden v. Boyce*, 425

9. Where a promissory note, payable in the city of New York, matured during the civil war, there being no pretense that notice of dishonor had been waived, or was unnecessary; it was *held* that an indorser residing in the State of South Carolina was entitled to notice; but that the holder was under no obligation to send it, as long as the impediment occasioned by war existed. *ib*
10. That it was his duty, however, to send it when the interruption of intercourse ceased. *ib*
11. That it was not a sufficient performance of his duty to the indorser to deposit in the post office at New York, a notice of protest addressed to him at his residence in Greenville, in the State of South Carolina, on the 4th of October, 1861, when open war prevailed between the government of the United States and the Confederate States, and there was no longer any actual mail communication between New York and South Carolina, and all intercourse or communication between the citizens of those States, respectively, was unlawful, and prohibited. *ib*
12. And that the holder, when he deposited such notice, did not put it in such course of transportation and delivery as would accomplish the duty imposed on him by law. *ib*
13. That the holder must be held to have known of the existing condition of the country, and the prohibition of intercourse; and he could not, therefore, cast upon the government the burden of preserving his letter, or its contents, until the termination of hostilities. *ib*
14. A promissory note given by a man to a woman, in consideration of her promise to marry him, is made upon and for a sufficient and valuable consideration. *Geo. G. BARNARD, J., dissented. Wright v. Wright, 506*
15. The subsequent marriage of the parties will not affect or destroy such a note. It is a contract to pay, made in contemplation of marriage, and by force of the statute, (*Laws of 1849, ch. 879*), remains in full force after the marriage. *ib*
16. It *seems* the payee can sue upon such a note, at law. But whether she can or not, this court having the case before it, in an action on the law side, showing that the note was the wife's separate property, ought, in some shape, to apply a remedy. *ib*
- See ALTERATION OF INSTRUMENTS.
MARRIED WOMEN.
USURY.*
- PURCHASER.**
- See MORTGAGE, 1.*
- R**
- RAILROAD COMPANIES.**
1. In every case where a party who has engaged to perform certain labor or services employs others to perform on his account, and such others, after commencing to perform, refuse to go on, or to allow the work to proceed, such refusal is the refusal of their employer; and if it amounts to a violation of the contract, it is the breach of the employer. Their misconduct, in such a case, is his misconduct, so far as it operates upon the contract and occasions non-performance. *Kearney v. Grand Trunk Railway Co. 104*
2. A general carrier of freight has no right to discriminate, in forwarding freight, between different owners, in favor of one class, to the prejudice of others, by deliberately stopping or delaying the property of one person, in order to give a preference to that of another, contrary to the ordinary course of business. *ib*
3. It *seems* that the negligence, against liability for which, a railway company is not permitted to contract, must be confined to that of the board of directors, or, at all events, cannot be extended beyond that of those managing officers who make the general regulations, for the running of the trains and the transaction of the business of the road, for the government of others, binding upon all the subordinate agents. *Per TALCOTT, J. ib*

4. The defendant, a common carrier, received from the plaintiffs, at Goderich, in Canada, a number of cattle, upon its cars, under a special contract, by which it undertook to forward them to Buffalo, to the consignee, "subject to their tariff, and conditions expressed." In these conditions it was expressed that the owners undertook all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise; and that the defendant did not undertake to forward the animals by any particular train, or at any specified hour, and was not responsible for the delivery thereof within any certain time, or for any particular market. The cattle were started the same day, and taken a part of the distance, and had the cars containing them gone on with the train, would have reached Buffalo the same night. Instead of this, the cars, when within sixty or seventy miles of that place, were, by a positive and peremptory order from the defendant's freight superintendent, detached from the train and placed upon a side track where the cattle could neither be fed nor watered, nor with any safety be unloaded, and were there detained three or four days, and several of the animals perished from hunger and the inclemency of the weather, and others were greatly reduced in flesh, weakened and otherwise injured. *Held*, 1. That according to the "conditions expressed" in the special contract, the defendant could not, in this manner, and for this length of time, suspend the performance of the undertaking it had thus commenced, without rendering itself liable to the plaintiffs for the damages occasioned by such suspension. 2. That the "conditions" did not extend to a case of damage arising from the deliberate and intentional act of the defendant, or its agents, in suspending performance after it had been commenced, and refusing to perform, or to allow performance, until after the property, or a portion thereof, had been destroyed, and other undertakings could be performed. In other words, that the defendant did not reserve to itself the right to perform or not as it might afterwards elect, or to perform only as it might suit its interests, convenience or pleasure.

3. That this was not a case of an injury arising from *negligence*, in any degree, but a case of an injury arising from a deliberate and intentional refusal to perform, for the time being, the undertaking of the defendant. 4. That such refusal by the defendant's freight agent, to perform the contract, was the act of the defendant, and the defendant was liable for the consequences, so far as his act or order had the effect to prevent performance, and thus create a breach of contract. And this, whether the agent was authorized to make the order or not. *3*

5. When, in an action against a railroad company, to recover the value of property claimed to have been destroyed by fire, in consequence of the defendant's negligence, it is made to appear that the injury was caused by sparks flying directly from a passing locomotive engine of the company, and alighting on the property, the burden is upon the defendant, of showing that the engine was in perfect condition, with the most approved apparatus for arresting sparks, and that such apparatus was in good order, at the time. *Case v. The Northern Central Railway Co.* 644

RAILROADS.

1. No person is authorized to apply to a justice of the Supreme Court, under section 22 of the general railroad act, of 1850, for the appointment of commissioners to examine the proposed route of a railroad and to affirm or alter the same, except one whose lands have not been acquired by the company, and after the service on him of the written notice required by said section to be given by such company. And he must feel aggrieved by the proposed location over or through his land, and set forth his objections to the route designated through his land, in his petition. *The People ex rel. The Erie and Genesee Valley Railroad Co. v. Tubbs*, 401
2. The commissioners thus appointed are to examine the proposed route, and hear the parties before deciding; that is, the parties to the proceed-

ing—the petitioner on the one side, and the company on the other—and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public. *ib*

8. It would be monstrous to hold that one landholder upon a route could, upon this hearing, force a different location, not only over his own land, but the lands of all his neighbors, who had had no opportunity of being heard in regard to it. The statute contemplates nothing of the kind, and was never intended to give, and does not give, any such power to the commissioners. *Per JOHNSON, J.* *ib*

4. This proceeding was designed not to put it in the power of a few individuals to obstruct and defeat the construction of railroads, but to give a remedy to a landholder who might sustain some extraordinary or peculiar injury from the proposed location, not common to other lands, through which the proposed route lay, which could not be adequately compensated in damages, and which might be prevented and avoided by a change, upon the land, consistently with the just rights of both parties and of the public. *Per JOHNSON, J.* *ib*

5. Where it appeared, upon certiorari, that commissioners appointed under section 22 of the general railroad act had exceeded, and gone far beyond, the scope of their powers; had undertaken to canvass, and sit in judgment upon, the duties and obligations of the railroad company, under its charter, in locating its road generally, and in its choice of routes; and the testimony in respect to the injury to the petitioners and their lands was of the slightest and most frivolous character; and from the evidence before the commissioners, and the map by them returned, of both routes and of the entire premises, it was impossible to discover any benefit which could accrue to the petitioners, by the new location, over the one proposed by the company; and it appeared clear, upon the whole case, that considerations quite different from those of injury to the petitioners' lands and the hope of ameliorat-

ing such injury, influenced and governed the actions of the commissioners, the direction and determination of the commissioners, changing the proposed route of the railroad, was reversed, and held for naught. *ib*

6. A copy of the petition for appointment of commissioners, under the 22d section of the general railroad act, should be served upon the railroad company, as a part of the notice of hearing before the commissioners, so that the company may be advised of what it is to meet. *ib*

7. The statute provides, in terms, for a hearing before the commissioners, after they shall have been appointed, of the parties, which of course includes the railroad company as one of the principal parties to the proceeding. *ib*

8. The right to appoint commissioners to issue the bonds of a town, to aid in the construction of a railroad, under the act of the legislature, of May 1869, (*Laws of 1869, ch. 907.*) depends upon the fact of a majority in number of the taxpayers of the town, owning or representing a majority in amount of taxable property within the limits of the town, petitioning the county judge for that purpose. The last assessment roll of the town is made the criterion for ascertaining that fact. *The People ex rel. White v. Hulbert,* 446

9. When a petition is presented to the county judge, for the appointment of commissioners under the act, the question to be determined by him is, whether or not the petition answers this requirement of the statute. *ib*

10. It is a valid objection to the petition, that a portion of the names upon it are signed as trustees, executors, administrators and guardians, respectively, and that it does not appear that such trustees &c. had authority to sign the petition; where the name signed to the petition as executor or administrator does not appear on the assessment roll, on which the assessment is to the "estate" of the testator or intestate, and the name of the person signing the petition as executor or administrator is omitted. *ib*

11. In such a case, it not appearing to the county judge that the signers are in fact what they assume to be, their signatures should be, and, unless they are necessary to make up the requisite majority, in number and amount, will be assumed to have been, excluded by the county judge. *ib*
12. It is not necessary that the petitioners should be owners of the property for which they are taxed. If they *represent* it, in any capacity, and are assessed on the tax list as so representing it, then they are taxpayers, and may become petitioners. *ib*
13. Thus, where one is assessed on the roll as *guardian*, he has the right to sign the petition as guardian, adding the estate which he represents. *POTTER, J., dissented.* *ib*
14. Where a religious society is assessed on the last assessment roll, and it is proved before the county judge that the petition was signed in its name, by officers of the society, in pursuance of a resolution of the board of trustees authorizing them so to sign, the society is entitled to be counted by the county judge, as a proper petitioner. *POTTER, J., dissented.* *ib*
15. A county judge does not, by signing a petition for bonding a town, in aid of the construction of a railroad, become incompetent to take cognizance of the proceeding. *ib*
16. A county judge, standing in the position of a taxpayer who has voted for the issuing of town bonds, is not thereby disqualified for counting the votes and ascertaining whether a majority, in number and amount of taxable property represented, has been given for the bonding of the town, or not. *ib*
17. If such majority has been given, the county judge has no power, in the premises, except to obey the statute, which makes it his duty, in such case, to appoint three commissioners to issue the bonds. *ib*
18. Upon a *certiorari* to a county judge, to review his proceedings upon a

petition for bonding a town in aid of the construction of a railroad, it is not competent for the relators to bring in question the eligibility of the persons whom the county judge has selected as commissioners to issue bonds; where no such question is made by the affidavit or complaint on which the *certiorari* was issued, and the writ does not call for any return on which the question of the eligibility of the commissioners can be examined, and the return fails to show anything on that subject, except that the order or judgment of the county judge states that they are freeholders, taxpayers and residents of the town. *ib*

19. Where proceedings for the bonding of a town, instituted in 1870, were based upon the assessment roll of 1869, instead of that of 1870, but the evidence clearly showed that at the time the proofs were taken, the assessment roll of 1870 had not been completed; *Held* that the requirements of the statute had been complied with. *ib*

RECITAL.

See CONTEMPT.
SUPPLEMENTARY PROCEEDINGS, 1.

REFEREE.

1. It is erroneous for a referee to receive and act upon the testimony of a non-professional witness as to the value of the plaintiff's services as a lawyer, after he has stated that he knows nothing of their value. *Smith v. Kobbe,* 289
2. A referee should pass upon objections to evidence, as they arise. It is error for him to reserve his rulings upon the questions arising, and objections made, until the final submission of the case, and then decide the case as though there had been no objections to any portion of the evidence. *ib*

REFERENCE.

See PRACTICE, 4.

REMAINDERS.*See* ESTATES.**REMOVAL OF ACTIONS.**

1. It was not the intent of the legislature, by the 2d subdivision of section 83 of the Code, to authorize the Supreme Court to remove into that court actions pending in the superior court or court of common pleas for the city and county of New York, except upon an application showing the propriety of *changing the place of trial* from the city of New York. *Per* INGRAHAM, P. J. *Jedyn v. Fish*, 308
2. The mere fact that sixteen actions between the parties are pending in the superior court and court of common pleas, and five are pending in the Supreme Court, will not authorize the removal of the actions pending in the former courts to the Supreme Court. *Per* INGRAHAM, P. J. 318

S**SET-OFF.***See* BANKS AND BANKING.**SHERIFF.**

1. After the liability of a sheriff had become fixed, by the neglect of his deputy to levy, collect or return an execution within its lifetime, the defendant applied to the plaintiff and obtained his written consent, to be exhibited to the deputy, stating that he would not proceed against the sheriff until the maturity of certain notes which the defendant proposed to leave with the deputy, and the avails of which, if paid at maturity, were to be applied by the deputy to satisfy the execution. *Held* that such consent did not *per se* operate to discharge the liability of the sheriff. *McKinley v. Tucker*, 93
2. The plaintiff in the execution having expressly refused to take the

notes, himself, or to do any act to impair his remedy against the sheriff, it was further *held*, that his written consent to postpone proceedings against the sheriff until the maturity of the notes thus put into the hands of the deputy did not operate as a ratification of the prior neglect of the deputy which created the liability. 38

3. Otherwise, *it seems*, if the plaintiff, after a valid levy, had consented to the arrangement, and to a postponement of a sale of the defendant's property in the meantime. 38

See ATTACHMENT.**SPECIFIC PERFORMANCE.**

Although it is matter of discretion whether specific performance will in any case be granted, yet the discretion must be exercised according to certain well established rules, and does not rest in the mere caprice of the judge. *Foot v. Webb*, 38

See AGREEMENT, 2.**STAMPS.***See* ASSIGNMENT, 3.**STATUTES.***See* NEW YORK, (CITY OF.)**STAY OF PROCEEDINGS.***See* ACTION.
ATTORNEY.**STEAMBOATS.***See* NEGLIGENCE, 1, 2.**STOCK.***See* AGREEMENT, 1.
ASSIGNMENT.
PRACTICE, 3.**STREAM.***See* WATER.

STREETS.

See NEW YORK, (CITY OF.)

SUPPLEMENTARY PROCEEDINGS.

1. Where an order made by a county judge requiring a judgment debtor to appear before a referee and answer on oath concerning his property, recites, expressly, that it had been made to appear before such judge, "by the affidavit" of one of the attorneys of the plaintiff, that judgment had been recovered in the action; that execution thereon, against the property of the defendant therein, had been duly issued; and that said judgment remained wholly unpaid, such recital is clearly sufficient, *prima facie*, to show that such proof had been made by a regular affidavit. It is a presumption which the law raises, in support of judicial authority and proceedings. *Rugg v. Spencer*, 888
2. The order speaks for itself; and as all the necessary facts, to constitute it a regular and valid order, appear upon its face, it will be deemed to be such, until the contrary is made to appear. *ib*
3. The fact that no proof by affidavit was in fact made, before the county judge, when he issued the order, is not sufficiently shown, to rebut the *prima facie* proof of the recital in such order, by the production of a paper in the form of an affidavit, found on file in the office of the county clerk, reciting the facts as set forth in the order, signed by the plaintiff's attorney, but not sworn to, and having no jurat attached; although such paper has an indorsement upon it, purporting that it had been read on motion at chambers, before the county judge, and filed as of the same date as the order. *ib*
4. The mere presentation of such a paper, on the trial, without any evidence to show by whom the indorsement thereon was made, or how the paper came to be on file in the clerk's office, is no proof of any fact in the case, and does not tend, in any

degree, to disprove the recital in the order. *ib*

SUPREME COURT.

See REMOVAL OF ACTIONS.

T

TAXES AND TAXATION.

See ASSESSMENTS AND ASSESSORS.

TOWING.

See NEGLIGENCE, 1, 2.

TOWNS.

Bonding for Railroads—*See* RAILROADS, 9 to 19.

TRIAL.

See ASSESSMENT AND ASSESSORS, 3, 4, 6.

TRUSTS AND TRUSTEES.

See AGREEMENT, 1.
EXECUTORS AND ADMINISTRATORS.
MORTGAGE, 2.
POWERS IN TRUST.

U

USURY.

Where, in an action upon a promissory note, given in renewal of a former valid note, the defense of usury is set up, it is not erroneous for the judge to charge the jury that in case they find a *bonus* was added, on giving the new note, over and above the amount due on the old one surrendered, they should still find a verdict for the plaintiff for the amount which is due on the old note. *Tift v. Moor*, 619

See CHATTEL MORTGAGE.
MORTGAGE.

V

VENDOR AND PURCHASER.

See AGREEMENT, 2.

W

WAR.

1. When a war is commenced between nations, it arrests, *eo instanti*, all commercial intercourse and voluntary communication with the enemy, without the permission of the government; and the citizens or subjects of one belligerent become the enemies of the other, and of all its citizens or subjects. *Harden v. Boyce*, 425
2. These results of war *inter gentes* were substantially applied to the citizens of the Confederate States, during the late conflict. *ib*
3. In the late rebellion there existed, between the government of the United States, and the Confederate States, a state of civil war, in the sense of international law, which brought with it the common incidents of war, and arrested all commercial intercourse and communication between the citizens of those States, respectively. *ib*

See INSURANCE, (LIFE.)

PROMISSORY NOTES, 9 to 13.

WATER.

1. Where a stream running across the defendant's land, and thence upon the plaintiff's land, below, during a flood broke through its bank, making an opening sufficient to carry all the water ordinarily running, and through this new channel the water would have continued to run, if not prevented; *Held* that the defendant had a right, for his own protection, to erect a barrier or levee across the crevasse or new channel, for the purpose of confining the waters within their original channel; provided he did not build such barrier too high, nor project it into the stream, so as to prevent the water running in its accustomed channel and with its usual force. *Pierce v. Kinney*, 56
2. *Held, also*, that the defendant was not bound to keep the original channel of the creek open upon his own lands, as a condition to his right to maintain such barrier. And that he was not liable to the plaintiff for any damages that might ensue from a failure to do so. *ib*
8. It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank, to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this, he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go, in ordinary floods; otherwise he will be liable for the injury. But this rule does not apply to floods altogether extraordinary and unusual. *Wallace v. Drew*, 413
4. Where it appeared that, although certain banks and erections made by the defendants, on their own premises, to guard the bank and prevent the waters of a stream from injuring such premises, had caused the waters of the creek to flow in a new direction upon the plaintiff's lands, where they did not belong, and were not accustomed to flow, and where they would not have gone, but for those guards and erections; yet, as all the water which flowed upon the plaintiff's premises, on the occasion of the injury complained of, did not come from the branch of the creek which flowed through the defendants' lands, or by means of their guards and erections; but that an obstruction placed by one M. in the channel of another branch of the same stream, which stream divided above the defendants' premises, had caused the waters of that branch, as well as those of the defendants' branch, to flow, at the same time, in about equal proportions, upon the plaintiff's land, and both streams had contributed to the injury complained of; *it was held* that it would be manifestly unjust to make the defendants respond for the portion of the injury and damage occasioned by the wrongful act of M., who was in no way connected with them, in act or interest, and whose obstruction was wholly upon his own land, and upon another stream. *ib*

WILL.

A testator devised to his son all his real estate during his life, and at and after the decease of his son, the same to be divided between his grandchildren, share and share alike, whether born before or after his own decease; and in case of the decease of any of his grandchildren before the death of his son, leaving issue, then such issue to take the share that the parents would be entitled to if living. *Held*, 1. That each grandchild, the moment it came into existence, took a vested interest in remainder, in fee, subject to open and let in after-born children. 2. That the devise of the remainder to the grandchildren as a class was to be regarded as vested, although all the persons who might take were not ascertained or *in esse*, and could not be, until the termination of the life estate. 3. That one

of the grandchildren having died before the termination of the life estate, his share descended to his father as heir at law. *Smiley v. Bailey*, 80

WITNESS.

The fact that a witness has been a convict cannot be shown by his own testimony, even on cross-examination, for the purpose of impeachment. *Tift v. Moor*, 619

WRITTEN INSTRUMENTS.

The language of a writing may be interpreted, and its true meaning ascertained, in the light, and by the aid, of the circumstances under which it is made. *McKinley v. Tucker*, 98

See ASSIGNMENT, 1, 2.

END OF VOLUME FIFTY-NINE.

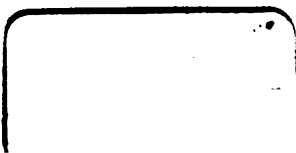
Y. L. B. T. S.

7541 068

h



HARVARD LAW LIBRARY,





HARVARD LAW LIBRARY